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HAROLD B. WILLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK,

Petitioner,

vs.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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SUPREME COURT OF THE UNITED STATES

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No. 232

CHARLES D. CLARK,

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THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is a criminal case in which petitioner was convicted in the District Court of Tom Green County, Texas, of murder and his penalty assessed by a jury at death. An appeal was taken by the defendant to The Court of Criminal Appeals of Texas (the Texas Court of last resort) and the conviction and judgment were affirmed.

The defendant's principal defense upon the trial was insanity and temporary insanity existing at the very time of the commission of the offense. The issue was submitted in the court's charge and the jury by a verdict of guilty found the defendant sane.

The defendant presents the Federal question:

1.) that he was denied effective and substantial aid of counsel of his own choice because the long distance telephone operator constituting the agency and means of communication between defendant and his counsel was permitted to testify as to the telephone conversation between defendant and his attorney; and,

2.) that defendant, relying upon insanity as a defense was deprived of effective and adequate counsel, because the evidence shows (and the Texas Court of last resort has held in this case) that defendant's counsel was an accessory to the offense with which defendant was charged and for which defendant was convicted and given the death penalty.

1.) On the first Federal question, defendant relies upon the rule announced in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, and *Coplon* v. *United States,* 191 Fed. (2) 749, cert. den. by the Supreme Court 342 U. S. 926, 96 L. Ed. 690, 72 S. Ct. 363, reversing 91 F. Supp. 867. In this *Coplon* case the court holds that a defendant is entitled under the constitution to privately consult with counsel both before and during the trial; that this right cannot be abridged, interfered with, or impinged upon in any manner; and *that defendant and his counsel have a right to talk together over the telephone without their conversation being monitored.*

The trial court in this case permitted the telephone operator who placed and completed the long distance phone call from defendant to his counsel, and who was the agency

selected by defendant for the confidential communication, to testify to the confession of the defendant over the phone to his lawyer that he had killed a woman.

2.) The telephone operator also testified that defendant's counsel advised defendant over the phone to dispose of the murder weapon. The Court of Criminal Appeals held that this made the attorney an accessory to defendant's crime under the Texas statute.

On this holding defendant presents the Federal question that he was deprived of effective and adequate aid of counsel, and that he had the constitutional right to have his defense of insanity and temporary insanity presented by adequate counsel, without possible conflicting interests and loyalty, and by counsel not criminally connected with his alleged offense, under the rule announced by this court in *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 467; and *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019; and *Hudspeth* v. *McDonald,* 120 F. (2) 962, reversing *McDonald* v. *Hudspeth, warden,* 41 F. Supp. 182; and *United States* v. *Handy, warden,* 203 F. (2) 407.

In the *Glasser* case the Supreme Court held that it was the duty of the trial judge to see that defendant was not deprived of effective and adequate aid of counsel arising from the attorney's conflicting interests which diminished and destroyed the attorney's usefulness to his client.

The above two serious Federal questions were seasonably presented and preserved by defendant as will hereinafter be made to appear.

Jurisdictional Statement

The Supreme Court of the United States has jurisdiction of this case under 28 U. S. C. 1257 (3), by Writ of Certiorari to The Court of Criminal Appeals of Texas, the highest State Court, from the final judgment of said court rendered

on May 6, 1953, overruling Appellant's Second Motion for Rehearing without written opinion. (Record, p. 136. Under the practice in The Court of Criminal Appeals in Texas, where a second opinion is written on rehearing, the judgment does not become final until a second motion for rehearing filed as a matter of right within fifteen days is overruled without written opinion.)

This petition for writ of certiorari is presented prior to August 4th, 1953, and within ninety days from the final judgment aforesaid as required by *Supreme Court Rule 38½*, adopted Nov. 15, 1948; and *United States Code, Section 2101 (c) and (d)*.

This petition is filed to review rights, privileges, and immunities denied the defendant and claimed under the Constitution of the United States, and the V, VI, and XIV Amendments thereto, under which as part of due process of law and the equal protection of the law, defendant was entitled to effective and adequate aid of counsel in his case.

The Questions Presented

1. The first question presented is that the defendant immediately after the alleged offense had the right guaranteed under the Constitution of the United States and the XIV Amendment thereto, and under the Constitution of the State of Texas, Article I, Section 10, and Articles 3 and 713 of the Code of Criminal Procedure of Texas 1925, to immediately consult an attorney over the telephone and seek the advice of such attorney, and that for the State Court to permit the telephone operator to listen to such conversation and report it to the prosecuting officials and to testify as to such conversation between the client and attorney upon the trial denied the defendant due process of law and the equal protection of the law.

Petitioner raised this question by appropriate objection to the testimony of the telephone operator upon the trial

of the case in the district court of Tom Green County, Texas, and specifically raised the Federal and Constitutional question. (See: Defendant's Bill of Exceptions No. 1, Record, pp. 1018; objected to on Federal Grounds, p. 13.) Petitioner further raised the question by Assignment of Error in his Amended Motion for New Trial (Record, p. 9). After the Court's opinions in this case, appellant presented the Federal Question in his second motion for rehearing (Record, pp. 134-135), which was overruled (Record, p. 136).

2. The second question presented is that the evidence raising the issue of defendant's insanity, and it appearing, and the Court of Criminal Appeals of Texas having held, that defendant's only attorney on the trial was an accessory to defendant's alleged offense under the Texas Statute (Article 77, Penal Code of Texas 1925), such fact created a conflicting interest between defendant and his attorney, and such conflict of interest diminished and destroyed the attorney's usefulness to his client, the defendant, and denied defendant due process of law and the equal protection of the law guaranteed by the Federal Constitution.

This point was raised by assignment of error presented in appellant's Second Motion for Rehearing (III paragraph, Record, p. 134), after the Court of Criminal Appeals for the first time in its opinion on Motion for Rehearing (Record, pp. 132-133) held that defendant's attorney in the trial court, Mr. Martin, was an accessory to the offense charged against defendant.

The Court of Criminal Appeals in its opinion on rehearing for the first time held that the telephone conversation between defendant and his attorney was not privileged because the attorney by the advice given to the defendant to dispose of the weapon made himself (the attorney) an accessory to the offense of murder.

For the first time the Court based its last opinion upon

a ground, if valid, deprived defendant of effective aid of counsel.

If defendant's counsel in the trial court was an accessory and in danger of indictment as such, his ability to properly represent defendant was diminished and destroyed. Counsel must be able to stand free and fearless before the Court in behalf of his client. And it is no answer that defendant (even if he were sane) knew the disqualifying facts and selected his counsel. Since defendant's counsel was incompetent and unable to freely represent the defendant, and defendant was deprived of his valid defense, and suffered the infliction of the death penalty, a constitutional question is presented. "Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by himself or by members of his family or friends rather than appointed by the court." See: *United States* v. *Handy*, 203 F. (2) 407, l. c. p. 417.

The Reasons Relied On for the Allowance of the Writ

The Court of Criminal Appeals of the State of Texas passed upon and decided two federal questions of substance 1.) as to the right of the petitioner, the defendant in this criminal case, to effective aid of counsel through confidential telephone communication, and 2.) as to defendant's right to competent and effective aid of counsel on his trial, by an attorney who is not shown by the evidence and held by the Court to be an accessory to the offense with which defendant is charged; the exact questions not theretofore determined by this court.

1.) The said Court of Criminal Appeals of Texas, in said case, decided the federal question of substance as to the right of the petitioner, the defendant in this criminal case, to effective aid of counsel through confidential telephone communication in favor of respondent herein, by

holding that the telephone long distance operator who, a short time after the alleged homicide, completed a long distance telephone call by defendant to his attorney could testify that she monitored the call and heard defendant confess to his attorney that he (defendant) had killed a woman and that the attorney volunteered the advice to defendant to "get rid of the weapon and sit tight and don't talk to anyone". The Court held this testimony admissible and the telephone communication between the client and attorney not confidential and privileged because the attorney gave the illegal advice to "get rid of the weapon" which made the attorney an accessory to the homicide under Article 77, Penal Code of Texas 1925, and that the monitoring of such communication by the prosecution through the use of the telephone operator did not deprive defendant of effective aid of counsel and of due process of law under the XIV Amendment to the Constitution of the United States; which decision is not in accord the decision of this Court in refusing a certiorari in *Coplon* v. *United States, 191 Fed. (2) 749, certiorari denied by the Supreme Court, 342 U. S. 926, 96 L. ed. 960, 72 S. Ct. 363, reversing 91 F. Supp. 867.*

The Coplon case held that due process includes the right of one accused of crime to have effective and substantial aid of counsel, and that an accused does not enjoy effective aid of counsel if he is denied the right of private consultation with him; and that defendant had the right to talk to his attorney over the telephone without their conversation being monitored by the prosecution.

There was a dissent in the *Coplon* case, and one of the Judges agreed with the District Court that no harm was done defendant, because no evidence obtained by monitoring the telephone conversation was offered on the trial. The dissenting opinion conceded that, if the prosecution

used the confidential telephone conversation as evidence, then due process would have been denied.

In *Johnson* v. *Zerbst, 304 U. S. 458, 82 L. ed. 1461, 58 S. Ct. 1019,* this Court said that effective assistance of counsel "requires the guiding hand of counsel at every step in the preceedings against him."

And in *Glasser* v. *United States, 315 U. S. 60 86 L. ed. 680, 62 S. Ct. 467,* this Court said: "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential right of the accused".

2). The said Court of Criminal Appeals of Texas, in said case, decided the federal question of substance as to the right of accused to effective aid of counsel and the effect upon such right resulting from the fact that defendant's counsel was shown to be an accessory to the homicide with which defendant was charged, and as to whether such conflict of interest between attorney and client diminished and destroyed the attorney's usefulness to his client, and deprived defendant of effective and substantial aid of counsel, in violation of due process under the XIV Amendment to the federal constitution in favor of the respondent by holding that the fact that the attorney was shown and held to be an accessory to the main offense did not diminish and destroy the attorney's usefulness to his client, even though defendant's defense was insanity, and did not deny defendant due process of law; which decision is not in accord with the principles announced in the decision of this Court in *Glasser* v. *United States, 315 U. S. 60, l. c. 76, 86 L. ed. 680, 62 S. Ct. 457.*

In the *Glasser* case a number of defendants were being tried. The Court appointed Glasser's attorney to represent another defendant in the case. This Court held that the trial court was familiar with all the facts, and that defendant, even though he did not object to the appoint-

ment, and apparently had accepted the situation, did not waive his right to effective aid of counsel, and that the conflict of interest between defendants denied the defendant, Glasser, effective and substantial aid of counsel and due process of law under the XIV Amendment.

Prayer

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to The Court of Criminal Appeals of Texas; and that the judgment herein of said Court of Criminal Appeals and of the District Court of Tom Green County, Texas, be reversed by this Court, and for such further relief as to this Court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK,

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vs.

THE STATE OF TEXAS

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Opinion Below

The Court of Criminal Appeals of Texas wrote two opinions in this case which have not been reported. The opinion on original submission appears in the record filed in the Court at pages 119-126. The opinion on rehearing appears in the record at pages 128-134.

Jurisdiction

1. The jurisdiction of the Supreme Court is invoked under Title 28, United States Code, section 1257, subdivision 3, the petitioner herein claiming, rights, privileges, and immunities under the Constitution of the United States.

This petition is filed to review the final judgment and decree of the Court of Criminal Appeals of Texas, and is filed in this Court within ninety (90) days from the final judgment and decree of the State Court, as provided by Supreme Court Rule 38½, and Title 28, United States Code, Section 2101, subdivisions (c) and (d).

The Court of Criminal Appeals of Texas wrote an opinion overruling appellant's motion for rehearing on April 8th, 1953. (Record, p. 128). Appellant filed a second motion for rehearing within fifteen (15) days on April 22, 1953, as permitted under the Rules and practice of the Court of Criminal Appeals, where a written opinion is filed on rehearing. (Record, p. 134). The Court of Criminal Appeals overruled the second motion for rehearing by final judgment and decree without written opinion on May 6, 1953. (Record, p. 136.) Petitioner has filed this Petition in this Court prior to August 4, 1953.

2. The Court of Criminal Appeals has by its judgment refused to accord to petitioner his right to effective and substantial aid of counsel by denying to defendant the opportunity of privately communicating with his attorney by long distance telephone at a time shortly after the State contends the homicide was committed. The evidence shows that the defendant went from a place near the scene of the homicide directly to his hotel room and placed a long distance call to his attorney. The long distance operator who made and completed the call, contrary to the regulations of her company listened to the conversation, and testified to defendant's confession to his attorney and that the attorney unsolicited by the client advised defendant to "get rid of the weapon".

Under the Constitution of Texas, Article I, Section 10, defendant was entitled to aid of counsel, by consultation with his attorney immediately after the offense was com-

mitted. The right to aid of counsel is also protected by Article 3, Penal Code of Texas 1925, and made confidential under Article 713, of the Code of Criminal Procedure of Texas 1925.

This right to advice of counsel is part of due process of law and the equal protection of the law afforded every accused by the Constitution and laws of the State of Texas, and in *Hamilton* v. *State,* 38 Tex. Crim. Rep. 427, 153 S. W. 331, l. c. 336, Texas highest criminal court has said:

"It is not necessary that the party desiring counsel should be preparing a defense against some accusation after an indictment found or after arrest. The statute is broader and fully comprehends every possible situation in which an accused person or person under arrest or not under arrest desires to consult counsel, *or communicate with counsel,* or obtain advice or service of counsel in the protection of his right."

This the Supreme Court has held in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, that effective aid of counsel "requires the guiding hand of counsel at every step in the proceedings against him."

A defendant in a criminal case in Texas is guaranteed effective aid of counsel, and a denial of this right by a Texas Court, deprives the defendant of due process of law, and the equal protection of the law guaranteed the defendant as a citizen of the United States under the XIV Amendment to the Federal Constitution.

The case of *Coplon* v. *United States,* 191 F. (2) 749, cert. den. by the Supreme Court, 342 U. S. 926, 96 L. Ed. 690, 72 S. Ct. 363, reversing 91 F. Supp. 867, held that due process of law necessarily included the right of private communication between a defendant and his attorney, and that such communication could be by telephone, and that to permit the telephone communication to be made available

to the prosecution denied the defendant due process of law.

If the only means of communication available to a defendant with his counsel is by telephone at a time immediately after he may have committed an offense, then if he is not entitled to have such conversation in private, not disclosed by the operator and agency used for the communication, then such defendant is denied the equal protection of the law vouched safe to a defendant whose counsel is present and available for personal consultation.

It is not a question of privileged communications, the limits of which may be defined by state law, and its interpretation. If there was no statutory privilege as to communications between attorney and client in Texas, still the right of an accused to effective aid of counsel and to private consultation is so essential to due process, that the limitation which a state might seek to place upon the rule of privileged communications could not affect the constitutional right of defendant to due process.

The Supreme Court has jurisdiction to prevent a State from denying a defendant due process of law and equal protection by preventing the State from denying a defendant effective and substantial aid of counsel at all stages after the commission of an alleged offense.

3. The Court of Criminal Appeals of Texas in its opinion on rehearing has held that Mr. Martin, who was defendant's sole attorney on the trial in the district court, was an accessory to the alleged offense, because he, unsolicited, advised defendant to "get rid of the weapon". The Court says that under Article 77, Penal Code of Texas 1925, Mr. Martin is an accessory. (See Opinion on Rehearing, Record pp. 128-130.)

In its opinion on original submission, the Court had held the telephone conversation admissible because it stated the telephone operator was a mere eavesdropper. (See Original

Opinion, pp. 122-124.) On rehearing it was pointed out to the Court that the operator was not an eavesdropper, but was the agent of the defendant by which the communication with the attorney was had. The Court of Criminal Appeals then no longer contended the operator was an eavesdropper but held the communication admissible because the attorney made himself an accessory.

If the attorney was an accessory, then he was in danger of indictment and could not fearlessly and freely represent defendant. His usefulness to his client was diminished and effectively destroyed.

Under *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457, this Court has said that if the interest of an attorney conflicts with the defendant so as to diminish his usefulness to his client, then the defendant is denied effective aid of counsel and due process of law.

The Supreme Court has jurisdiction to require a State to see that a defendant pleading insanity is not represented by an attorney whom the evidence shows is an accessory to the offense.

Statement of the Case

A short summary of the matters involved has been stated in the preceding Petition for Writ of Certiorari which is hereby adopted and made a part of this Brief.

Additional specific statements and references to the Record will be made in connection with the argument under the errors relied upon.

Errors Relied Upon

1. The Court of Criminal Appeals erred in construing Article 713, Code of Criminal Procedure of Texas, 1925, and in holding the testimony of Marjorie Bartz, as shown by Defendant's Bill of Exceptions No. 1, was admissible and did not violate the privilege of the defendant as to con-

fidential communications with his attorney made over the telephone, because such holding of the Court deprived the defendant of effective and substantial aid of counsel of his own choice, at a time when such aid and the means and agency used were necessary, in violation of defendant's rights to the equal protection of the law and due process of law as guaranteed by the Constitution of the United States and Amendments thereto, and the Constitution and laws of the State of Texas; and in particular in violation of the V, VI, and XIV Amendments to the Constitution of the United States; and Article I, Section 10, and Article I, Section 19, of the Constitution of Texas, and Article 3 and 713 of the Code of Criminal Procedure of Texas 1925. (II Ground, Second Motion for Rehearing, Record pp. 134-135).

2. The Court of Criminal Appeals erred in not holding, that if the attorney for defendant, Mr. Martin, was an accessory under Article 77, Penal Code of Texas 1925, (as the Court of Criminal Appeals holds in its opinion on rehearing), then the possibility of conflicting interests between attorney Martin and the defendant, his client, and such conflict of interest, diminished and destroyed the attorney's usefulness to his client, the defendant, and deprived and denied defendant his right to have the effective assistance of counsel, and denied defendant due process of law in violation of the V, VI and XIV Amendments to the Constitution of the United States, and Article I, Sections 10 and 19, of the Constitution of Texas, and Article 3, Code of Criminal Procedure of Texas 1925. (III Ground of Second Motion for Rehearing, Record, pp. 135-136.)

ARGUMENT

I

Under First Assignment of Error

1

Statement Under First Assignment

Defendant in the trial court was charged by the grand jury of Tom Green County, Texas, with murder of Laverne Clark with malice by shooting her with a gun (Record, p. 5).

Laverne Clark was the wife of the defendant, and one of defendant's defenses was that he was insane and that at the very time of the offense he was so mentally deranged that he did not know right from wrong. The trial court submitted these issues to the jury (See main charge, Record, pp. 5-7; and Requested Charge No. 4, Record, p. 2).

The jury found defendant guilty and assessed his penalty at death (Record, p. 8).

On trial of the case, over defendant's objection, the State offered the testimony of Marjorie Bartz, long distance telephone operator at San Angelo. At 2:49 a. m., shortly after the homicide (according to State's theory as to time of homicide), she testified that she placed a long distance telephone call from defendant's hotel from the defendant (she recognized his voice) to his lawyer, Jimmy Martin, in Dallas. Contrary to the rules and regulations of the company she listened to the conversation. She testified she heard the following:

"Q. (By Mr. Earl Smith, continuing) Tell the jury now what the conversation was.

"A. Well, after I got the number, he said, 'Hello, Jimmy, I went to extremes.'

"Q. Who said that.

"A. Mr. Clark. He said, 'I went to extremes'; and he said, 'What did you do?' He said, 'I just went to extremes.'

And he said, 'You got to tell me what you did before I can help'; and he said, 'Well, I killed her.' He said, 'Who did you kill, the driver?' He said, 'No, I killed her.' He said, 'Did you get rid of the weapon?' and he said, 'No, I still got the weapon'; and he said, 'Get rid of the weapon and sit tight and don't talk to anyone, and I will fly down in the morning.' " (Defendant's Bill of Exception No. 1, Record pp. 14-15.)

Defendant objected to the above testimony, "on the grounds that the attempt to relate the conversation was an invasion of the privacy and in the nature of tapping telephone and telegraph wires, which was done in violation of the defendant's constitutional rights and against the laws of the United States and that of Texas" (Record, pp. 13-14).

Tomas Menchaca testified that he was handy man around the hotel (Record, p. 19), that the night of the homicide he was with defendant and went in a car with him to his wife's home sometime around midnight or after. He waited outside of the house in an alley back of the house while defendant went in. The witness after defendant had been gone about 15 minutes heard a noise like a shot, and in about 15 more minutes defendant came out and they went to the hotel, where defendant said he was going to put in a call to a friend in Dallas. The witness left the room and did not hear the conversation, but returned after defendant was through talking. The only thing he heard defendant say was, "All right, I will do it" (Record, p. 27).

The witness testified that after the telephone call he and defendant left the hotel and defendant had two guns with him. Defendant let witness out of the car down the street and was gone about thirty minutes, when he returned and picked witness up. When defendant picked up witness, one of the guns was gone (Record, pp. 27-29).

Mr. Hankins, a witness for defendant testified that on March 26, 1952 at 2:48 A. M. that the records of the hotel

showed that the defendant made a long distance call to Dallas (Record, pp. 101-102).

The issue of insanity at the time of the homicide, was raised by the evidence. Mr. Hankins testified that the defendant was insane the night of the homicide and the morning after (Record, pp. 86-89).

The Court of Criminal Appeals states in its opinion that the issue of insanity was raised by the evidence (Record, p. 121).

The error was presented by assignment of error in defendant's motion for new trial in the district court (Record, p. 9).

The Court of Criminal Appeals, in its original opinion, treated the question as one of the admissibility of the testimony of an eavesdropper to the communication between client and attorney. (See Original Opinion, Record, pp. 122-124.) The Court held that the telephone operator was a mere eavesdropper and that the testimony was not privileged.

The defendant presented the matter again by motions for rehearing (Record, p. 127).

The Court in its opinion on rehearing holds that the phone conversation and the testimony of the phone operator was admissible because of the illegal advice given by the attorney, Mr. Martin, which the Court held made Mr. Martin an accessory under Article 77, Texas Penal Code 1925 (Record, pp. 131-133).

The Federal question was raised again on Second Motion for Rehearing (Record, pp. 134-136).

2

ARGUMENT UNDER FIRST ASSIGNMENT

The admission of the testimony of the witness, Marjorie Bartz (the telephone operator handling the long distance

call to defendant's counsel) clearly deprived defendant of the right "to have effective and substantial aid of counsel under the rules approved by the Supreme Court of the United States in *Coplon* v. *United States,* 191 Fed. (2) 749, cert. den. by the Supreme Court, 342 U. S. 926, 96 L. Ed. 690, 72 S. Ct. 363, reversing 91 F. Supp. 867.

The *Coplon* case involved the very question of monitoring confidential communications between the defendant and counsel as presented in our case. It did not involve the introduction of evidence in violation of the Federal Wire-tapping Statute. The Court of Appeal (Ct. App. D. C.) held that no such evidence was offered, and that the lower court did not err in regard to the wire-tapping statute.

Our case and the *Coplon* case, neither present the question of the *Federal Wire-tapping* case, as was urged in *Schwartz* v. *Texas,* 97 L. Ed. (Advance Sheets) 157. This Court is, of course, familiar with the *Schwartz* case which held the Federal Statue did not make evidence obtained by wire-tapping inadmissible in a trial in the State courts.

But the question present in our case and the *Coplon* case is the violation of the privilege of a defendant to consult with his counsel, and the denial of due process of law where this right of "effective and substantial aid" is denied him.

After disposing of the wire-tapping assignment in the *Coplon* case, Judge Miller, citing many authorities, speaking for the Court of Appeals, says:

"These cases unequivocally establish the principle that the two Amendments guarantee to persons accused of crime the right privately to consult with counsl both before and during trial. This is a fundamental right which cannot be abridged, interfered with or impinged, upon in any manner. The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel. We consider it equally true that a defendant and his lawyer have a right to talk together by telephone without their conversations being monitored by the prosecution through

a secret mechanical device which they do not know is being used. It would not be an answer to say that the accused cannot complain of the interception of his telephone conversations with his counsel if he had on other occasions ample personal consultation with his lawyer, face to face, which no person overheard. That fact would not erase the blot of unconstitutionality from the act of intercepting other consultations.

"In his opinion denying the motion for a new trial, the trial judge limited the generality of the constitutional guaranty that an accused shall have the right of private consultation with counsel by holding that the government's intrusion upon that privacy does not violate the two Amendments unless it is the means of procuring evidence used to convict."

It is to be noted in the *Coplon* case that the Court held it did not affect the defendant's right to "effective and substantial aid of counsel" that no evidence was offered on the trial resulting from the interception of the telephone conversation between the attorney and client. The Court in the opinion says:

"We think the District Court erred in holding that the interception of telephone messages between appellant and her counsel before and during her trial, if it occurred, was nothing more than a serious breach of ethics unless such interception yielded evidence which was introduced against her. It is true, as the court pointed out, that paragraph 605 of the Communications Act, as construed by the Supreme Court, does not make wire-tapping an offense but does condemn as criminal the interception and disclosure of the contents of the message, both acts being essential to complete the offense. But that is not analogous to the Fifth and Sixth Amendments, which unqualifiedy guard the right to assistance of counsel, without making the vindication of the right depend upon whether its denial resulted in demonstrable prejudice. The Supreme Court said in *Glasser* v. *United States*, 1942, 315 U. S. 60, 76, 62 S. Ct. 457, 467, 86 L. Ed. 680: '• • • The right to have the assistance of counsel

is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.' "

The only distinction which could possibly be urged between the *Coplon* case and our *Clark* case is that in the former the telephone conversations were monitored by a mechanical device setup by the prosecuting authorities, while in our case the prosecuting officers did not instigate the telephone operator in listening to the conversation.

But a defendant is as effectively denied aid of counsel, if the agent selected for the confidential communication discloses the conversation to the district attorney and is permitted to testify, as if the prosecuting officers had instigated the operator in advance to listen in and monitor the conversation. The defendant is entitled to private and confidential conversation with his attorney over the telephone and to make available the substance of the conversation to the prosecution through a telephone operator who secretly listens in destroys this valuable right to aid of counsel.

It appears from the opinion of the Court of Criminal Appeals on Rehearing in our case, that the Court concedes that the witness Bartz was not a mere eavesdropper and that the Court agrees that as she was a part of the long distance telephone system selected by defendant as the agency and means of communication with his counsel that she was an essential part of the privilege communication. If the testimony of Miss Bartz was admissible, then Mr. Martin, aside from his right against self incrimination, could have been called and required to have testified as to the telephone conversation.

The Court misconceives the whole theory of the privilege against disclosure of the communications between a client and his attorney. The Court applies (expressly) the same rule to a defendant seeking advice from his attorney after the commission of an offense that applies to a wrongdoer

visiting his attorney in advance and seeking advice as to how to commit a crime.

In *Turner* v. *State*, 91 Cr. 627, 241 S. W. 162, 23 A. L. R. 1378, the Court says:

"Concerning the rights of a person accused of crime, the Bill of Rights says: 'He shall have the right of being heard by himself or counsel or both, shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor.' This, like other provisions of the Constitution, requires the obedience and support of public officials. The law does not restrict the right of representation by counsel to the mere matter of appearance upon the trial of his case. To deny him the privilege of the advice of counsel in the preparation of his case for trial is an unwarranted abridgement of the right guaranteed him by the Constitution. *Mindful that it is essential to the enjoyment of this right that free and private communication with his counsel be permitted,* the legislature has by statute inhibited the disclosure by the attorney at law of matters revealed to him by his client, coming to his knowledge by reason of such relationship."

Suppose the defendant, Clark, after the offense in this case was committed, had driven to Dallas and had met his attorney at the attorney's home, or in the attorney's office, and suppose the same conversation had occurred. Could the attorney have been called as a witness and required to testify because the attorney had volunteered to his client the advice that he should get rid of the weapon?

The late Professor Ray, sometime Professor of Law at the University of Texas, in 12 Texas Law Review, pp. 148-149, says:

"It has always been held that the privilege will not be applied in furtherance of contemplated criminal or fraudulent acts. So where advice is sought for the purpose of guiding the client in the commission of a crime, or perpetration of a fraud, no privilege can be claimed. *This does not*

mean that where the crime or fraud has already been committed the client may not seek his attorney's advice and be fully protected. It simply means that there is no privilege as to disclosures relating to future wrongful acts.'' (Italics ours.)

The Court of Criminal Appeals surely does not hold, or intend to hold, that Clark in concealing and withholding the weapon, if he did so, committed a new offense, or violated any law. There is no such law, and such a law, if passed, would be invalid. A murderer, if Clark may be said to be one until finally convicted, has a constitutional right against self incrimination, and he cannot be required, and owes no legal duty, to furnish incriminating evidence against himself, nor to keep and surrender to the prosecuting officers the criminal weapon.

A defendant may not be an accessory to his own crime. It would be the duty of his attorney to advise him that he need not furnish testimony against himself. If such advice were given, the communication would be privileged. But the State Court says, if the advice was, ''hide the weapon where no one but you knows where it is'', then the whole conversation, including defendant's admission of guilt, is no longer privileged.

Does the privileged character of a communication between client and attorney after the commission of an offense and his right to effective and substantial aid of counsel depend upon the ethical character and legality of the advice given by the attorney?

Judge Ray in his article in the *12 Texas Law Review,* at p. 152 says:

''Any form of communication employed by the client, whether it be by agent, messenger, or interpreter, is sufficient to invoke the privilege. The statements and advice of the attorney are just as much protected as the communications of the client. *This is necessary in order to pre-*

vent inferences being drawn as to the nature of the client's communication as well as to keep them from being used as the client's admissions." (Italics ours.)

In our case Clark, according to the State's theory, after the offense, called his attorney immediately in Dallas. But the State Court says the privilege did not immediately attach. In this the Court is in error.

Judge Ray says, at p. 149:

"What of communications made during the negotiations prior to the acceptance of the case by counsel? Since the client cannot know whether the attorney will accept the case or whether the client will be able to meet the fee asked by the attorney, these preliminary statements must be protected if the privilege is to be effective."

The essentials of the attorney and client privilege have been stated as follows:

"(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived."

See also: *McCormick and Ray, Texas Law of Evidence,* Sections 223-228, pp. 312-318.

In *VIII Wigmore on Evidence,* Sec. 2287, p. 542, the text says that telegrams generally, because they are telegrams are not privileged. But the text says: "Were the telegram addressed to an attorney, in whose hands it would be privileged, the situation would be different; but the doctrine of agency, as applied to the client's privilege, suffices to protect, without creating a new privilege."

And in Sec. 2301, pp. 584-585, the same author says:

"The assistance of these agents being indispensable to his work, and the communications of the client being often

necessarily committed to them by the attorney or by the client himself, the privilege must include all persons who act as the attorney's agents."

In *I Greenleaf on Evidence* (14th Ed.), Sec. 239, p. 304, it is said:

"This protection extends also to all necessary organs of communication between attorney and his client." See also: Sec. 240 same text.

"The presence, advice, and assistance of counsel" is said by Story to be necessarily included in "due process of law". See: *Story on the Constitution,* p. 688; quoted in *Ex. parte Chin Loy You,* D. C. Mass. 1915, 223 Fed. 833.

While the V and VI Amendments of the Constitution of the United States do not apply to prosecutions in the State court, yet in Texas the same rights are guaranteed by Article I, Sections 10 and 19, of the Constitution of Texas, and such guarantees are part of the "due process of law" protected by the XIV Amendment to the Constitution of the United States.

A man who has committed a crime is entitled to, and should, immediately consult an attorney. If he is guilty, he should, but is not so required, make a full disclosure to his attorney. If his disclosure is unprivileged if his attorney gives him unethical or illegal advice, he will be unable to risk disclosure.

"In *Bunbury v. Bunbury* (1839), 2 Beav. 173, 48 Eng. Reprint 1146, wherein privilege was claimed for communication passing from the defendant to his agent 'as the channel of communication between defendant and his solicitors and legal advisers,' the court said: 'I believe that the case of Walker v. Wildman (1821), 6 Madd Ch. 47, 56 Eng. Reprint 1007, discussed infra, III has never been in any way disputed, and I have some recollection of a case in which the principle there acted upon was carried still further; it certainly appears to me there may be very many

cases in which a party, not being able himself to have a direct communication with his solicitor, is compelled to employ an intermediate agent for the purpose of thus effecting a communication of matters of a confidential nature. *In such cases the necessity which arises of transmitting such communication through another party renders it privileged.*"

One great object of our legal system is that the rights of all persons shall be submitted with equal force to our courts of justice. To accomplish this object, the first indispensable requisite is, that the client shall state to his legal advisers *all the facts* of his case. But how will a client venture to lay before the counsel a statement of all the facts of his case, if that very statement may hereafter be evidence against him? There will be an end to equality, if one person has an advantage over another, because he is sufficiently cunning in the law to know what may, and what may not, be safely revealed to counsel. Such equality never can exist unless client and counsel are completely identified, and their communications held to be impervious to judicial investigation, as if they never had been uttered.

It is an acknowledged axiom, that every man knows the law. The axiom works but little injustice, because every man can ascertain the law by consulting a lawyer. But the condition, upon which this power of ascertaining the law will rest, is, that he may make the inquiry without incurring any danger. The communication must be privileged to the utmost extent, or it will not be made.

It is thought that the great Texas court of so much history and prestige in Texas, and throughout the United States, in announcing the rule that they have in the opinion on rehearing, has not seriously considered the fearful relation which it will create between a lawyer and his client. In the long list of our profession, names will appear treacherous to oaths, their ethical faith, and to their clients,

the names of men who *"scire volunt secreta domus atque inde timeri"*. Such lawyers, if the rule announced by this Court is to prevail, will have their clients at their mercy, and may at any time betray them and contrive their ruin.

"The greatest trust", says Lord Bacon, "between men and men, is the trust of giving counsel. For in other confidence men commit parts of life; their lands, their goods, their children, their credit, some particular affair; *but to such as they make their counsellors they commit the whole, by how much the more they are obliged to all faith and integrity.*" (Italics ours.)

The lawyer must have the whole of his client's case, or he cannot pretend to give any useful advice. That the whole will not be told to counsel unless the disclosure is confidential and privileged is perfectly clear. A man who seeks advice, seeks it because he believes that he may do so safely. Rarely indeed has any question been made of the soundness of this privilege.

Acknowledgement is made by counsel for petitioner herein in the formulation of the above arguments to many cases, principally among which are *Annesly* v. *Earl of Angleslay,* 17 How. St. Tr. 1225 (English); *Anderson* v. *Bank,* L. R. 2 Ch. D. 644 (English); *Hatton* v. *Robinson,* 14 Pick. 416; *Wade* v. *Ridley,* 87 Me. 368, 32 Atl. 975; and *The Law Magazine,* XVII, p. 68.

This Court of Criminal Appeals in its opinion on rehearing after holding in effect that Mr. Martin, the attorney consulted by defendant, became an accessory under Article 77 to defendant's offense, says that when appellant conversed with Mr. Martin, he was not under arrest nor was he charged with a crime. "He had just inflicted mortal wounds on his former wife and apparently had shot her daughter."

May counsel ask just what that had to do with the question of privilege? In determining the admissibility of the

claimed privileged conversation the evidence must be tested as it was offered in the trial court under the presumption of innocence to which defendant was entitled. Yet the Court has passed upon the admissibility of the evidence assuming and taking for granted and conceding defendant's guilt.

Defendant was convicted on circumstantial evidence and upon the admission of the claimed privileged conversation. If the conversation had not been admitted, it is very doubtful indeed that defendant would have been convicted and certainly that he would have received the extreme penalty.

The telephone conversation was the basis of a particular prejudicial argument by the prosecuting attorney that defendant could not have been insane at the time of the phone call, or he would not have sought the advice of his attorney. (See Defendant's Bill of Exceptions No. 13, Record, pp. 169-174.)

But is the admissibility of a communication between a defendant and his lawyer to be determined by whether the trial court or the Appellate Court believes the defendant is guilty or innocent? Is the admissibility of the communication to be determined by the seriousness of the crime? Is such a communication admissible in a murder case in which the Court is of the opinion that the defendant had just "inflicted mortal wounds on his former wife and apparently had shot her daughter", but not admissible in traffic violations. See *Powell* v. *Alabama*, 287 U. S. 45, 77 L. Ed. 158, 53 S. Ct. 55, 84 A. L. R. 527.

If the character of the offense does not affect the privilege, then why does the Court of Criminal Appeals refer with such heated words to defendant's offense? Why does the Court of Criminal Appeals say "and apparently had shot her daughter", when there is not a line of testimony in the record that defendant shot the daughter of deceased.

The opinion of this Court in pragmatically fitting the rule of admissibility of the claimed privileged communication to

what the Court conceives a barbarous and inexcusable crime has its counterpart in American Criminal Jurisprudence alone in the views of one eminent opponent to the entire doctrine of privilege, *Mr. Jeremy Bentham,* in his *Rationale of Judicial Evidence,* C. IX, pt. IV, c. 5. His views may be briefly summarized: "The deterring of a guilty man from seeking legal advice is no harm to justice, while the innocent man has nothing to fear and therefore will not be deterred."

The Court in its opinion has held that the defendant when he made the telephone call was for some reason improperly seeking the aid and advice of counsel. The Court in effect holds that a defendant who has committed the crime of homicide may not consult an attorney until he is charged with the crime and placed under arrest.

In *Hamilton* v. *State,* 68 Tex. Crim. Rep. 427, 153 S. W. 331, l. c. 336, Judge Davidson said:

"It is not necessary that the party desiring counsel should be preparing a defense against some accusation after an indictment found or after arrest. The statute is broader and fully comprehends every possible situation in which an accused person or person under arrest or not under arrest desires to consult counsel, *or communicate with counsel,* or obtain advice or services of counsel in the protection of his rights."

And the Supreme Court has said in *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, that effective aid of counsel extends to every stage of the proceedings against him.

Is the fact that a man seeks advice of counsel before he is charged with an offense and before he is arrested such a judicial determination of his guilt as to deprive him of the privileged character of the communication?

What did defendant do which took his contacting the attorney of his choice out of the realm of "legitimate course

of professional employment in making or preparing a defense at law''?

This Court will concede, surely, that:

1. Defendant had the legal right to contact Mr. Martin at the time he did.

2. That he had the right to do this over the telephone.

3. That the operator, Miss Bartz, as the agency used was covered by the privilege.

4. That defendant properly told his attorney that he had gone to extremes and killed a woman.

5. That defendant had the constitutional right to withhold the weapon and not to furnish it as evidence against himself.

Yet the Court of Criminal Appeals holds that the admission of guilt made by defendant to his attorney is not privileged, because the attorney unethically and illegally, and unsolicited from defendant, advised defendant to get rid of the weapon.

Of course, the Court says, ''Besides he killed his wife and probably shot her daughter and the weapon was not found.''

Is a man, who goes to his counsel after a crime to confess and seek advice, to be denied his privilege because his attorney was a rascal? The Texas Court says: ''Yes. You, the defendant are a murderer, and wounder of girls, a wicked and evil man. You shall not have the benefit of confidential consultation with your lawyer, because your lawyer is a bad man.''

II

Under Second Assignment of Error

1

STATEMENT UNDER SECOND ASSIGNMENT

Petitioner adopts in full the Statement heretofore made under the First Assignment of Error.

Joan Potts, a witness for the State, testified that she was the fifteen-year-old daughter of the deceased woman, and that the night of the homicide around 2:30 a.m. (about the time of the homicide) she was awakened and saw defendant (her stepfather) standing in her room with a gun in his hand. He talked to her and asked her to help him persuade her mother to go back to him, but that she refused to help him. She did not testify to any shots and knew nothing of an attack on her mother or herself (Record, pp. 45-51).

Ed Hicks, an officer, testified that he went to the home of the deceased the morning after the homicide and went first to the daughter's room and found a bullet, which he identified in the girl's bed; and also a bullet out of the mattress in the bed of the deceased (Record, pp. 52-54).

Fred Rymer, a ballistics expert, testified the bullets were fired from the same gun (Record, pp. 55-56).

The defendant testified he has been very ill for a month prior to the homicide, and he had no recollection of anything that occurred (Record, pp. 63-66; Record, pp. 70-74; p. 76; pp. 79-81).

The Court of Criminal Appeals for the first time in its opinion on rehearing based its holding on the proposition that the telephone conversation was admissible because defendant's attorney was an accessory under the Texas Statute, Articles 77, Texas Penal Code 1925 (Record, pp. 132-133).

Petitioner assigned error and presented the Federal question raised by this holding (Record, pp. 135-136).

2

ARGUMENT UNDER SECOND ASSIGNMENT

The defendant was represented in this case by Mr. Jimmy Martin. Mr. Martin was his only attorney upon the trial of the case, except Mr. Kennedy, partner of Mr. Martin, who did not cross examine any witnesses or make any objections or take any exceptions.

That defendant shall have adequate counsel is guaranteed under Article I, Section 10, of the Constitution of Texas, and failure of defendant to have such aid, as guaranteed by that provision of the Texas Constitution, denies the defendant due process of law under the XIV Amendment to the Constitution of the United States. See: *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 457; and *Coplon* v. *United States,* 191 Fed. (2) 749, art. den. 342 U. S. 926, 96 L. Ed. 690, 72 S. Ct. 363. See also: *Saucier* v. *State,* Cr. App., 235 S. W. (2) 903, cert. den. 341 U. S. 949, 95 L. Ed. 1372, 71 S. Ct. 1016; and *Savage* v. *State,* Cr. App. 237 S. W. (2) 315.

The testimony of the telephone operator as to the conversation between the defendant and his attorney not only implicated Mr. Martin as an accessory, but it made the attorney a material witness in the case. Canon 19, of the Canons of Professional Ethics, 62 Reports of Am. Bar Ass'n (1937), p. 1112, provides:

"When a lawyer is a witness for his client, except as to mere formal matters, such as attestation or custody of an instrument and the like, he should leave the trial to other counsel."

An attorney to properly represent his client must be able to stand fearlessly and freely before the court at all stages of the trial without fear of sanctions.

The right of defendant to be represented by adequate counsel is so basic to the concept of due process and fair administration of justice that it was recognized and provided as an inherent right to which the World War II defendants tried for War Crimes were entitled in the Nuremberg Trials.

The *Charter of the International Military Tribunal, Sec. IV, Fair Trial for Defendants, I Nazi Conspiracy and Aggression (1946), p. 8,* insured to the defendants assistance of counsel. See also: *Robert H. Jackson, Nuremberg in Retrospect,* 35 Am. Bar Ass'n Journal, p. 881.

This right was accorded to defendants before a bar without protection of Constitutional guarantees of due process.

In determining the question of whether or not the defendant had adequate counsel, the problem must be considered and approached from the situation as it existed in the trial court and upon the presumption that defendant was innocent.

If, as contended by defendant, and which was to be determined by the jury, defendant had no recollection of this telephone conversation with his attorney, and did not know that his attorney had made himself an accessory, then the attorney had placed himself in a position where the attorney's presence in the case was the most prejudicial thing in the case against the defendant. It was impossible for the attorney to give defendant fair representation. The conduct of the attorney, not only prejudiced the defendant before the jury, but the conduct of the attorney has seriously impressed the Texas Appellate Court in passing upon the appeal.

The manner in which the Court has viewed Mr. Martin's

conduct from the record before it is illustrative of the effect such evidence must have had upon the trial jury. Mr. Martin knowing that such conversation had occurred should have withdrawn from the case.

Even if it could be said to be undisputed that defendant was not unconscious and that he, too, knew of the conversation, defendant was a layman. He was not familiar with legal rules, nor of professional ethics, nor of the effect upon his rights, and his life, of his attorney's misconduct. He was forced to rely upon his attorney to advise him as to these matters.

McDonald v. *Hudspeth,* warden, 41 F. Supp. 182, was an original habeas corpus case for the release of an inmate of the Federal penitentiary because of his failure to receive due process upon his trial and conviction.

In that case defendant's counsel was of his own choosing. During the trial, the attorney was drunk, and had at times to be led from the court room. Frequently he was asleep in the court room during the trial. The record of the trial did not show defendant objected or requested other counsel.

It was held by the district court that due process of law was denied the defendant on his trial, and he was ordered released.

The Court of Appeals reversed the case in *Hudspeth* v. *McDonald,* 120 Fed. (2) 962, but did so on the facts. The appellate court held that it was undisputed "that, if counsel was drunk, that condition was not apparent to the trial judge; that appellee (defendant) did not call the condition of his counsel to the court's attention"; and that "the record was conclusive that no request was made that the court appoint other counsel to represent appellee" (defendant).

If the trial court in the above case had known of the matters disqualifying defendant's counsel, it would clearly have been the duty of the court to caution defendant and

warn him that his attorney was inhibited from fairly representing him and that he was entitled to other counsel.

In *United States* v. *Handy,* 203 F. (2) 407, l. c. 417, in an opinion by the Court of Appeals Third Circuit, the Court says:

"Darcy was entitled to be competently defended by counsel learned in the law. Though questions of degrees of competency and learning may always be present there is assuredly a level below which the courtroom performance of counsel representing a defendant in a capital case may not sink or the Fourteenth Amendment will be encountered. It is not necessary here to discuss or determine questions of degree, what degree of negligence or incompetence may be sufficient, or what insufficient, to void a criminal trial. If Darcy's counsel was so negligent or incompetent that he was deprived thereby of a valid defense or suffered the imposition of a penalty of death, a constitutional question is presented. See Tompsett *v.* State of Ohio, 6 Cir., 146 F. 2d 95, 98-99, and the authorities therein cited; United States ex rel. Feeley *v.* Ragen, 7 Cir., 166 F. 2d 976, 980-981; Jones *v.* Huff, 80 U. S. App. D. C. 254, 152 F. 2d 14, 15-16; United States *v.* Wight, 2 Cir., 176 F. 2d 376, 378-379; United States *v.* Bergamo, 3 Cir., 154 F. 2d 31, 34-35; Abraham *v.* State, 228 Ind. 179, 184, 91 N. E. 2d 358, 360; Miller *v.* Hudspeth, 164 Kan. 688, 707, 192 P. 2d 147, 162. See Johnson *v.* Zerbst, 304 U. S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461, and Miller *v.* Hudspeth, 10 Cir., 176 F. 2d 111. See in particular Commonwealth *v.* O'Brien, 312 Pa. 543, 546, 168 A. 244, 245; Commonwealth *v.* Balles, 160 Pa. Super. 148, 154, 50 A. 2d 729, 732, and Commonwealth *v.* Jodlowsky, 163 Pa. Super. 284, 286, 60 A. 2d 836, 837. *Nor should it be deemed to be a pertinent distinction that the defendant's counsel is selected by himself or by members of his family or his friends rather than appointed by the court.* See Sanchez *v.* State, 199 Ind. 235, 157 N. E. 1." (Italics ours.)

A court alone is competent to determine whether counsel is able to give effective and substantial aid to his client's

case. Laymen select their attorneys because the law holds attorneys out as competent. A lawyer may not ethically sell his abilities to his client. The client, not knowing the law, cannot intelligently decide whether his attorney has become disqualified to properly represent him. To cast this burden upon a defendant in a criminal case, where the Court is familiar with the facts disqualifying the attorney, denies the defendant an opportunity to have competent and effective representation.

Particularly is this true where one of the issues is the insanity of the accused, and the defendant, if insane, could not rationally determine whether or not his counsel was disqualified.

In *Johnson* v. *Zerbst,* 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, the Supreme Court of the United States said that effective assistance of counsel "requires the guiding hand of counsel at every step in the proceedings against him."

In the case of *Glasser* v. *United States,* 315 U. S. 60, 86 L. Ed. 680, 62 S. Ct. 467, the Supreme Court said:

"Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. Speaking of the obligation of the trial court to preserve the right for an accused, Mr. Justice Sutherland said that such duty 'is not to be discharged as a matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial, or from any of the essential elements thereof, *and with a caution increasing in degree as the offense dealt with increases in gravity.*" (Italics ours.)

With respect to defendant waiving his right to competent counsel, the Supreme Court said:

"This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by accused.

While an accused may waive the right to Counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record."

In the *Glasser* case a number of defendants were being tried. The Court appointed Glasser's attorney to represent another defendant in the case whose interest conflicted with that of Glasser. The Supreme Court held that the trial court was familiar with all the facts, and that the defendant, even though he did not object to the appointment, and apparently had accepted the situation, did not waive his right to effective aid of counsel.

In our case, it became the duty of the trial court, as soon as out of the presence of the jury it became apparent that the testimony of Miss Bartz would reveal facts, which the Court of Criminal Appeals has held would make Mr. Martin an accessory, to stop the trial and to warn the defendant that his counsel had been placed in a position which would render his aid as counsel ineffective and disastrous to defendant's case, and should have ascertained if defendant desired to proceed, or to secure other counsel. The failure of the Court to so act denied defendant the effective aid of counsel and denied him due process of law under the Constitution of the United States and Amendments thereto, and under Constitution and Laws of the State of Texas.

Conclusion

The Court of Criminal Appeals has treated the question involved in this Petition as merely questions of admissibility of testimony, and not as affecting defendant's rights to due process and the equal protection of the law.

The Supreme Court should determine whether or not a defendant who is accused of murder is entitled to talk to

his lawyer over the telephone and seek advice of his attorney without such conversations being reported to the prosecuting officials by the telephone operator and without such conversation being used against him on the trial.

The Supreme Court should decide whether or not a defendant whose defense is insanity is deprived of adequate and substantial aid of counsel, when it is made to appear that because of illegal advice given by the attorney, the attorney has made himself an accessory to the alleged principal offense.

Petitioner submits that the Petition for Writ of Certiorari should be granted, and the judgment of the Texas Court of Criminal Appeals and District Court should be reversed.

Respectfully submitted,

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SEP 17 1953

HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The original opinion of the Texas Court of Criminal Appeals (R. 434-443) is dated January 14, 1953. The opinion on motion for rehearing (R. 462-472) is dated April 8, 1953.

STATEMENT OF THE CASE

LaVerne Clark (deceased) obtained a divorce from Petitioner, Charles D. Clark, on March 25, 1952 in the District Court of Tom Green County, Texas. (R 411). Petitioner employed as his attorneys in the divorce case, James H. Martin and Newton Kennedy of Dallas. These attorneys negotiated a property settlement agreement with deceased's at-

torney, which agreement was executed by Petitioner and deceased, and their attorneys, filed and approved by the Court (R 407).

That night, March 26, 1952, LaVerne Clark was shot to death at her home while in bed and Petitioner herein was indicted therefor, tried and convicted by a jury in San Angelo, Tom Green County, Texas, in the District Court and his punishment assessed at death. Petitioner employed the same attorneys that had represented him in his divorce case to defend him in the murder case and he was represented at his trial by the same attorneys, James H. Martin and Newton Kennedy, both participating therein, and which said attorneys filed a motion for new trial, prepared all bills of exceptions and perfected his appeal to the Court of Criminal Appeals at Austin. These attorneys, together with W. C. McDonald of San Angelo and Robert Benavides of Dallas, filed briefs and argued the case on its submission. The judgment was affirmed by the Court of Criminal Appeals January 14, 1953, (R. 443). Motion for rehearing was filed by the same attorneys, with one additional attorney, Wm. E. Davenport, San Angelo, which motion was overruled April 8, 1953. (R. 472). A second motion for rehearing was filed by W. C. McDonald, Wm. E. Davenport and John Cofer of Austin, which motion was also overruled on May 6, 1953.

It is pointed out to this Honorable Court that Petitioner was represented at his trial by the same attorneys who represented him in his divorce proceedings and it is apparent he selected and wanted these attorneys.

JURISDICTION

Petitioner has not invoked the jurisdiction of this Court under 28 U.S.C. 1257 (3) for the following reasons:

1. Nowhere in the record, and particularly in Petitioner's Bill of Exception and Motion for New Trial, did Petitioner specially set up or claim any title, right, privilege or immunity under the Constitution of the United States.

2. The grounds of error here presented were never urged in any manner before the trial court and under the rules of practice in the Court of Criminal Appeals in Texas, the latter Court could not consider such alleged errors, and this Court is without power to consider Federal questions not raised in accordance with the requirements of State laws.

3. Petitioner is late in filing in this Court.

ARGUMENT AND AUTHORITIES ON JURISDICTION OF THE SUPREME COURT

As its first proposition in opposition to the petition of Charles D. Clark, the Respondent calls the attention of the Court to the fact that at no time has Petitioner complied with the jurisdictional requirements of this Court concerning its review of State decisions by Writ of Certiorari.

Petitioner seeks to invoke the jurisdiction of the Court under 28 U.S.C. 1257 (3) without complying with the requirement of such statutes in that, Contra to his assertion, Petitioner did not specially set up or claim any right, title, privilege or immunity under

the Constitution of the United States. A review of Petitioner's Bill of Exception No. 1 (R 10) and his motion for new trial (R_____) shows this to be true, for his objections and exceptions there made were wholly insufficient to notify the trial court of any Federal question now being urged, and not having been thus set up or claimed in that Court, the Petitioner has failed to invoke the jurisdiction of this Court. At this point, the statement of Petitioner that the Court of Criminal Appeals of Texas passed upon and decided two Federal questions of substance should be and is challenged. This is not true, the Court of Criminal Appeals not having had such questions before it for its determination and being thereby precluded from so determining.

The scope of review of the Court of Criminal Appeals of Texas is limited to the grounds or assignments of error which a defendant has preserved by an adequate Bill of Exception and motion for new trial in the trial court. The Texas Court has expressly held that such matters as are not thus set up or assigned cannot be considered by it on appeal, *Zieg v. State*, 171 S.W. 747; *Harvel v. State*, 72 S.W. 2d 604; and this course has been followed even in a death penalty where on appeal complaint was first made of matters not objected to or excepted to during the trial. *Fisher v. State*, 2 S.W. 2d 249.

As early as 1877, this Honorable Court advanced and adhered to a policy that it did not have jurisdiction if an alleged violated right was not pointed out in the trial court. Mr. Chief Justice Waite, speaking for the Court in ex parte: *Spies*, 31 Lawyer's Edition 80, stated that the Supreme Court had no jurisdiction to review such matter as the State Court

itself could not review. In the Spies case, the error complained of on appeal was that a letter said to have been obtained by an illegal search should not have been admitted into evidence. Part of the opinion pertinent here is to the following effect:

> "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review h e r e is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

The Court's present policy is the same and can be seen in the recent case of *Edelman v. California*, 97

Lawyer's Edition 227, wherein the Petitioner contends that his conviction for vagrancy violated the Due Process Clause of the 14th Amendment, such contention being made for the first time as one of Petitioner's grounds of appeal. In language reminiscent in the Spies case, Justice Clark, speaking for the Court stated:

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. *Hulbert v. Chicago*, 202 U.S. 275, 50 L. Ed. 1026, 26 S. Ct. 617 (1906); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 308, 47 L. Ed. 480, 484, 23 S. Ct. 375, 63 L.R.A. 33 (1903). Non compliance with such local law can thus be an adequate state ground for a decision below. Aside from state law regarding the scope of review in cases such as this one, we note that California permits affirmance in criminal cases where the appellant fails to appear. It follows that the question whether the vagrancy statute is invalid under the Fourteenth Amendment is not properly before us."

In the review of these pronouncements and the adherence of this Honorable Court to a well defined policy requiring any Federal question to be "specially set up or claimed" the Petitioner has never invoked the jurisdiction of this Supreme Court. His only objection being so broad as to say in effect "that is against the Constitution," he gave the trial and appellate court below nothing to decide and such having occurred, this Court is without a jurisdictional

basis to grant a Writ of Certiorari or to review the prior proceedings in any manner. The Supreme Court of the United States has no jurisdiction in this cause.

After the case was all over, Petitioner decided to urge his case upon this Court. He then realized the lack of any federal question, so he tried to get such into the record by a second motion for rehearing, a most untimely step, and one calculated to unduly impose upon the Court of Criminal Appeals claims which Petitioner had no right to inject at such late date.

The Texas Court of Criminal Appeals has, on rare occasions, granted leave for filing a second motion for rehearing, but it has announced in *Webb v. State*, 110 Crim. Rep. 503, 7 S.W. 2d 562, 9 S.W. 2d 335, that the filing of s e c o n d motions for rehearing "places an undue, unnecessary, a n d unprofitable burden upon the court, and it is hoped that the members of the bar will refrain from attempting second motions for rehearing except it be on rare and extraordinary occasions."

There being no federal question properly presented and preserved in this case, petitioner has no right to Writ of Certiorari herein.

The attempt of Petitioner at a second motion for rehearing does not give him additional time within which to file petition for Writ of Certiorari under your Rule 38½. His filing should have been completed within the ninety days allowed therefor after April 8, 1953.

THE QUESTION PRESENTED

1. Whether the admission in evidence by the trial court of the testimony of the telephone operator as to a conversation between Petitioner and one of his counsel denied Petitioner due process of law and the equal protection of the law.

2. Whether the Petitioner was denied due process of law and the equal protection of the law by an alleged conflict of interest which might have occurred between Petitioner and Counsel representing him in the trial of the case.

ARGUMENT AND AUTHORITIES ON THE QUESTIONS PRESENTED

I

First Question Restated

[1.] Whether the admission in evidence by the trial court of the testimony of the telephone operator as to a conversation between Petitioner and one of his counsel denied Petitioner due process of law and the equal protection of the law.

Petitioner states his first assignment of error to be that the trial court and the appellate court below failed to accord him the right to effective and substantial aid of counsel but denied him the opportunity of privately communicating with his attorney by telephone, and cites in support thereof the recent case of *Coplon v. United States*, 181 Fed. 2d 749. (cert. den. by Supreme Court, 342 U.S. 926, 96 L. Ed. 690, 72 S. Ct. 362, reversing 91 F. Supp. 867).

Petitioner correctly states that the Coplon case involved the question of intercepting or monitoring confidential communications between defendant, Judith Coplon, and her counsel, but such is not under any circumstances, the question in the instant case, as this Court will readily see.

Petitioner has pointed out in his brief and has attempted to pass over, the distinction between the Coplon case and our case—this distinction being that in the Coplon case, as part of a well planned and executed investigatory scheme, the telephone conversation of the accused and her counsel was fully monitored by employees of the Federal Government in an attempt to confirm the Government's suspicions concerning Miss Coplon, whereas, in our case, a telephone conservation between Petitioner and his counsel was *overheard* by a mere *eavesdropper*. (Emphasis ours.)

At many points in the petition and brief there have been statements made that the telephone operator was part of the agency or means of communication and therefore part of the privileged communication. Each of these statements is here emphatically challenged and denied. Respondent further challenges and denies that the Court of Criminal Appeals ever held, recognized, conceded or agreed that Majorie Bartz, the telephone operator, was more than eavesdropping. The record will show that the Texas Court held in its original opinion that she was an eavesdropper. This opinion was not withdrawn, or the holding changed by anything in the Court's second opinion.

The agency or means of communication was the telephone itself, and after the operator connected

the Petitioner and his counsel, she dropped out of such means of communication and was no longer a part thereof. The communication was not transmitted through or by Miss Bartz. Her eavesdropping put her in the same class as anyone else hearing the parties conversing. Petitioner can find no comfort from the extra curricular activities of Miss Bartz. The conversation said to be privileged fails to remain such when overheard by a third party. This proposition has been so generally accepted that this reply will not be enlarged by the citing of authorities. As an eavesdropper, as any eavesdropper to an otherwise privileged conservation, the operator was wholly comptent to testify, was not covered by the privilege and no error resulted from the admission of her testimony by the trial court.

The holding of the Coplon case merits no further expansion than to a comparable fact situation, which does not exist in the instant case. It cites *Louie Young v. Coleman*, D.C.S.D. Idaho 1934, 5 F. Supp 702, and *U.S. v. Benuto*, 182 F. 2d 519, and other cases wherein the Courts have found that an accused has been *denied* the right to secure counsel or to converse with counsel. Excerpts from the Coplon case show very conclusively that the District of Columbia Circuit Court of Appeals was concerned with a *denial* of the right of conversing with counsel and with action instigated or condoned whereby conversations were monitored or intercepted. Note this language from the Court's opinion.

> "The prosecution is not entitled to have a representative present to hear the conversations of accused and counsel. We consider it equally

> true that a defendant and his lawyer have a right to talk together by telephone without their conversations being monitored by the prosecution through a secret mechanical device which they do not know is being used."

If Petitianer had been held incommunicado without opportunity of being advised by counsel, if a police officer or a person from the prosecuting attorney's office remained with Petitioner and his counsel at all times, if some monitoring device was set up in Petitioner's cell where he and his attorney were talking, or if the trial Judge had refused to let Petitioner's attorney talk with him during the recess of trial, then the Coplon case would be applicable. No situation or instance in any way similar to the Coplon case or the authorities therein cited occurred in our case. Petitioner has been *denied* nothing. His conversation with his chosen counsel was before the crime was detected, and was overheard and the person overhearing was properly allowed to reveal the details thereof. He called his attorney immediately after leaving the scene of the murder and carried out the instruction "Get rid of the weapon." This was the same attorney who had been representing him. It was fortunate in the interest of justice that the conversation was overheard.

II

Second Question Restated

[2.] Whether the Petitioner was denied due process of law and the equal protection of the law by an al-

leged conflict of interest which might have occurred between Petitioner and Counsel representing him in the trial of the case.

Petitioner's second assignment of error is said to be supported by the Coplon case, *Glasser v. U. S.*, 86 L. Ed. 680, *Hudspeth v. McDonald*, 10 Cir. F. 2d 962, *U. S. v. Handy*, 3 Cir. 203, F. 2d 407, and *Johnson v. Zerbst*, 82 L. Ed. 1461. Particular emphasis appears to be placed upon the opinion of this Court, speaking through Mr. Justice Murphy in Glasser v. U. S., 86 L. Ed. 680, and we direct the Court's attention to facts of that case. Glasser and Kretske were tried at the s a m e time under indictments charging a conspiracy. Both men were assistant United States attorneys and trial was had in a Federal District Court. Glasser was represented at trial by one Stewart; Kretske was without representation on the day of trial and the Court, Stewart and both defendants entered into colloquy prior to trial which resulted in Stewart's being appointed to represent Kretske along with h i s representation of Glasser.

This Court stated that the case against Glasser was not a strong one. A review of the trial proceedings shows that Mr. Stewart could not effectively examine witnesses for Glasser for fear of jeopardizing the rights of Kretske, and he could not properly examine Kretske's witnesses for fear of the harm which might result to Glasser. The theories of defense of Glasser and Kretske were so divergent as to foreclose effective representation of both parties by

one attorney. Glasser recognized that there was a conflict of interest between Kretske and himself. He pointed this out to the Court. The trial court's failure to understand this and to consider it forms the basis of the Supreme Court's opinion reversing the case. The situation is in no way similar in our own case. In fact, the conflict of interest between the Petitioner and his trial counsel appeared to no one until it was inferentially raised by the Court of Criminal Appeals following the Petitioner's motion for rehearing and stated by the Court merely as further argument for the fact that the communication objected to was not privileged. The facts of the Glasser case are clearly inapplicable when applied to our own case. Petitioner quotes extensively from the Glasser case but a material part of this court's opinion was omitted. We quote therefrom as follows:

> " 'The Court: How would it be if I appointed you attorney for Kretske?
> Mr. Stewart: That would be for your Honor to decide.
> 'The Court: I know y o u are looking out for every possible legitimate defense there is. Now, if the jury understood that while you were retained by Mr. Glasser the Court appointed you at this late hour to represent Kretske, what would be the effect of the jury on that?
> 'Mr. Stewart: Your Honor could judge that as well as I could.
> 'The Court: I think it would be favorable to the defendant Kretske.
> 'Mr. Glasser: I think it would be too, if he had Mr. Stewart. That's the reason I got Mr. Stewart, but if a defendant who has a lawyer rep-

resenting him is allowed to enter an objection, I would like to enter my objection. I would like to have my own lawyer representing me.' "

Following the above, the Court noted that Glasser remained silent. He never affirmatively waived the objection which he initially advanced when the trial court suggested the appointment of Stewart.

In holding that Glasser was deprived of the effective assistance of counsel, guaranteed by the Sixth Amendment, this Court stated:

> "There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of a n y conflict of interest the additional burden of representing another party may conceivably impair counsel's effectiveness."***
>
> "*** Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting that counsel undertake to concurrently represent interests which might diverge from those of h i s first client, when the possibility of that divergence is brought home to the court.***"
>
> "Here the court was advised of the possibility that conflicting interests might arise which would diminish Stewart's usefulness to Glasser. Nevertheless Stewart was appointed as Kretske's counsel. Our examination of the record leads to the conclusion that Stewart's represen-

> tation of Glasser was not as effective as it might have been if the appointment had not been made. We hold that the court thereby denied Glasser his right to have the effective assistance of counsel, guaranteed by the Sixth Amendment."

The present counsel for Petitioner would tell this Court that Charles D. Clark does not have the right to choose his own counsel; his desires should not be respected or adhered to. He should not be allowed to be represented by the same attorneys who represented him in divorce negotations and who represented him without complaint until the Court of Criminal Appeals affirmed his conviction. Finally, and as the real basis for the present argument, counsel for Petitioner says that all this is true because attorney Jimmie Martin, one of his attorneys, exercising his best judgment and using his best efforts, could not prevent the conviction of Petitioner for a terrible crime. If this petition is denied the next group of attorneys may think of some error of judgment which Petitioner's present counsel have made. And this criticism of members of the Bar will be ended only by the culmination of all the means of review at Petitioner's disposal. As stated by Judge Minton in U. S. ex rel *Weber v. Ryen*, 176 F. 2d 579, p. 586: "As to the requirement under the Fourteenth Amendment, the services of counsel meet the requirements of the due process clause when he is a member in good standing at the bar, gives his client his complete loyalty, serves him in good faith to the best of his ability, and his service is of such character as to preserve the essential integrity of the pro-

ceedings as a trial in a court of justice. He is not required to be infallible. We know that some good lawyer gets beat in every lawsuit. He made some mistakes. The printed opinions that line the walls in our offices bear mute testimony to that fact. His client is entitled to a fair trial, not a perfect one."

To this we would add the consideration of this Court in the Glasser case, that the *desires* of an accused as to *his* choice of counsel should be respected. The Petitioner would have this Court say that not only is the lawyer's client entitled to a perfect trial but that he is entitled to foresightedness, which none of us possess to know the result of our dicisions before we make them — this too, is not a requirement under the Fourteenth Amendment.

The above quotation was a part of the opinion in *U. S. v Handy*, 203 F. 2d 407, a case cited by the Petitioner. We have been favored with part of that opinion, but, lest this Court be misled, we would offer the above language as well as the following:

> "There is, however, as Judge Huxman pointed out in Hudspeth, Warden v. McDonald, 10 Cir., 1941, 120 F. 2d 962, 968, 'a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel.' It is the latter only for which the state is responsible, the former being normally the sole responsibility of the defendant who selected his counsel. And so where, as in the case now before us, a defendant in a criminal case has retained counsel of his own choice to represent him it is settled by an overwhelming weight of authority

that the commission by his counsel of what may retrospectively appear to be errors of judgment in the conduct of the defense does not constitute a denial of due process chargeable to the state. "When counsel is retained by a defendant to represent him in a criminal case he acts in no sense as an officer of the state. For while he is an officer of the court his allegiance is to his client whose interests are ordinarily diametrically apposed to those of the state. It necessarily follows that any lack of skill or incompetency of counsel must in these circumstances be imputed to the defendant who employed him rather than to the state, the acts of counsel thus becoming those of his client and as such so recognized and accepted by the court unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. A defendant cannot seemingly acquiesce in his counsel's defense of him or his lack of it and, after the trial has resulted adversely, have the judgment set aside because of the alleged incompetence, negligence or lack of skill of that counsel."

Much of the language of the Sixth Circuit Court of Appeals in the case of *Tompsett v. State of Ohio*, 6 Cir., 146 F. 2d 95, cert. den. 65 Supreme Court 916, is applicable to what has occured in our case. The Tompsett case concerned an appeal from a dismissal of a petition requesting a writ of habeas corpus. The accused, Edwin Tompsett, was indicted for armed robbery and was assessed a life sentence by the Ohio State Court. He was represented in his trial before the Court by an attorney which he and a co-defendant had employed.

One basis of Tompsett's petition for habeas corpus was that he did not have the benefit of competent counsel at all necessary stages of the proceedings against him, in violation of his rights under the Fourteenth Amendment. In support of this, he plead that his attorney failed to attend a preliminary hearing; that his attorney suggested that he waive jury trial, which he reluctantly agreed to do; that his attorney failed to subpoena several witnesses who could have supported Tompsett's alibi; that the attorney r e f u s e d to cross-examine the State's witnesses. Tompsett further alleged that previous to his employment, the attorney had been charged with violating the Criminal Statutes of Ohio, and in order to avoid prosecution for the offense, he had promised to do whatever the law enforcement officers of Ohio wanted him to do—that the acts of omission and commission of Tompsett's attorney were the result of influence and dominion over him by the prosecuting officers. In affirming the District Court's action dismissing the petition, the Circuit Court spoke of the guarantees of the Fourteenth Amendment and the fact that the same could be waved by an accused. In finding and holding that an effective waiver of such right had occurred, the Court stated:

> "So far as this branch of the case is concerned the question revolves itself into how fair, if at all, appellant was bound by the acts of his attorney or his failure to act in the course of the trial. The incompetency or negligence of an attorney employed by a defendant does not ordinarily constitute grounds for a new trial and

a fortiori will not be grounds for the application of the Fourteenth Amendment. (Citing cases). The concept of this rule is that the lack of skill and incompetency of the attorney is imputed to the defendant who employed him, the acts of the attorney thus becoming those of his client and so recognized and accepted by the court, unless the defendant repudiates them by making known to the court at the time his objection to or lack of concurrence in them. *A defendant cannot seemingly acquiesce in his attorney's defense of him or lack of it and, after the trial has resulted adversely to defendant, obtain a new trial because of the incompetency, negligence, fraud or unskillfullness of his attorney.* (Emphasis ours.)

"The foregoing rule has no application when it is made to appear that the defendant is ignorant of his rights and unacquainted with the course of proceedings in criminal cases. In that event if the attorney selected by such a defendant is so incompetent or dishonest or so improperly conducts defendant's case as to amount practically to no representation, the defendant is prejudiced and thereby deprived of a fair trial and a court should grant relief by use of the writ of habeas corpus. *Coates v. Lawrence*, D. C., 446 F. Supp. 414, affirmed in 5 Cir., 131 F. 2d 110. Appellant's case does not come within the exception.

"Appellant makes no showing that his is unfamiliar with the course of proceedings in criminal cases; on the other hand, he shows a great familiarty with them. All of the misconduct of his attorney of which he complains occurred in open court and in the presence of the presiding

judge, yet at no stage of the proceedings did appellant repudiate his counsel or manifest to the court his objection to or lack of concurrence in the procedure counsel was following. Under such circumstances it must be concluded that appellant intelligently waived trial by jury and consented to or ratified all other acts of his attorney of which he complains.***

"The claim of appellant that his attorney was improperly influenced by the prosecuting officials of Ohio becomes immaterial to the issue because of the rule here applied that appellant acquiesced in the attorney's conduct. Under such circumstances the motive of the attorney is immaterial as it did not influence appellant in his acquiescense."

We feel that the language of the court in the Tompsett case has clear application here, particularly that part which we have emphasized above. If, as Petitioner asserts, due process of law extends to a trial court being required to stop criminal trial and to inform an accused that the man he has hired and has confidence in, his dawyer, cannot defend him, then due process has been extended to an uncontrollable degree — to a point where judges shall have the opportunity and duty as Petitioner contends, to prejudge the attorney of an accused during a trial and to determine his honesty, integrity and competence from what the judge anticipates the evidence will disclose subsequent to the time he is required to pursue such action. The case has never occurred, nor will it ever occur, where, from testimony of a wit-

ness, the court has determined for an accused that his chosen counsel cannot or should not represent him. The novelty of such a proposition is surpassed only by the ingenuity and inventiveness of Petitioner in changing his position since his arrest for this henious crime. To his prior inconsistencies, he now adds the plea that he could not waive his rights to the effective aid of counsel because his defense was that he was insane and he was therefore unable to rationally determine whether or not his counsel was disqualified (p. 33, Petitioner's Brief). For the very first time, as the record will disclose, Petitioner presents his defense that he was insane at the time of the trial. Even the *present* counsel for Petitioner never urged *this* before, having strongly argued in their second motion for rehearing that Petitioner was entitled in the trial court to his requested charge on temporary insanity at the very time of the tragedy in his case. (R.____).

The defense was temporary insanity at the time of the murder—Petitioner claimed he did not remember anything that happened that night. He did not claim he was insane at the time of the trial—he voluntarily took the witness stand and there was a lengthy direct and cross examination. (R____). He did not remember calling his attorney—but he carried out the instructions of the attorney, and "got rid of the weapon." He made no complaint about his attorneys—he knew them—they had represented him before, and therefore, they were his choice. Whether they won or lost is not the test—the attorneys filing

this petition cannot know if they could have done better.

The trial court has no right or duty to interfere with the relationship between an accused and the counsel of his choice. In the words of Judge Minton, if the attorney employed to represent an accused gives him his complete loyalty, serves him in good faith to the best of his ability and his service is of such character as to preserve the essential integrity of the proceedings as a trial in the court of justice, neither the court nor the accused has cause to complain.

The questions Petitioner has sought to get before this Court are narrow, individual, personal questions, not important federally, and not of the calibre warranting review by this Court on certiorari.

The testimony of the telephone operator was held admissible on two adequate State grounds, one being that she was an eavesdropper (R. 438) and the other that a criminal act (hiding the murder weapon) was advised in the communication. (R. 469).

The question of inadequacy of counsel is but an effort to build by inference upon something to argue about, but having neither substance nor merit.

The record shows (R. 1 and 182) that Petitioner had two lawyers representing him in the trial and appeal of this case, *which were the same lawyers that represented him in the divorce case;* other lawyers came in on appeal.

Petitioner was properly and duly tried in a Texas Court for a Texas crime and unless there is a Federal question, this Honorable Court is not concerned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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HAROLD B. WILLEY, C

No. 232

Supreme Court of the United States

OCTOBER TERM, 1953

CHARLES D. CLARK,
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THE STATE OF TEXAS,
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PETITIONER'S REPLY BRIEF

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No. 232

Supreme Court of the United States

OCTOBER TERM, 1953

CHARLES D. CLARK,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

PETITIONER'S REPLY BRIEF

I

Jurisdiction

Respondent states on pages 3 and 4 of its Brief in Opposition, in effect, that petitioner did not present the federal questions involved in this cause in the court below.

This statement of the respondent is not in accordance with the record in this case. These questions were presented in the courts below as follows:

1. At the time the testimony of Miss Bartz, the long distance telephone operator at San Angelo, was offered, and her testimony was admitted, defendant objected to the admission of said testimony on the grounds that the attempt to relate the conversation was an invasion of privacy and in the nature of tap-

ping telephone and telegraph wire, which was done in violation of the defendant's constitutional rights and against the laws of the United States and of Texas. (Record, pp. 13-14.)

The error was presented by assignment of error in defendant's Motion for New Trial in the District Court (Record, p. 9).

The defendant presented the matter again by Motion for Rehearing (Record, p. 127).

The federal question was raised again as to the admission of this testimony on Second Motion for Rehearing (Record, pp. 134-136).

2. The Court of Criminal Appeals for the first time in its opinion on Motion for Rehearing based its decision upon the point that petitioner's attorney in the trial court, Mr. Martin, was an accessory under the Texas Statute, Article 77, Texas Penal Code 1925 (Record, pp. 132-133). The Court of Criminal Appeals for the first time held that the fact that the attorney was an accessory and the fact that the said attorney gave unethical and illegal advice to the defendant with reference to disposing of the weapon, made the testimony admissible. This being the first time this point was raised by any court in the case, the petitioner within the time permitted by the practice of the court filed his Second Motion for Rehearing, in which petitioner particularly raised the point and federal question under the *Glasser* case, that the attorney, Mr. Martin, was disqualified because he was an accessory, and since the defendant's principal defense was insanity, his representation by said attorney with a conflicting interest deprived the defendant of effective aid of

counsel in violation of the Constitution of the United States and the 14th Amendment thereto. (Record, pp. 135-136).

In the steps as outlined above, the defendant adequately presented and preserved the federal questions for presentation to this court. Even if there were no assignments in the trial court, or if it might be said that the objection and assignment of error taken was not full enough, it is well settled that the Supreme Court can review questions of infringement of the due process clause of the Constitution of the United States, and the 14th Amendment, discussed in the State Court of final resort, although the questions were not presented to the State Court by assignments of error as required by its rules. See: *Nickey vs. State of Mississippi*, 292 U.S. 393, 78 L. Ed. 1323, 54 S. Ct. 743.

It is only in those cases where it does not appear that the federal question was presented and passed on by the highest state court that it is necessary for the United States Supreme Court to look into the Bill of Exceptions taken in the court of original jurisdiction to see what points are carried up and whether they were necessarily involved in the judgment of the state court. See: *Neilson vs. Lagow*, 12 Howard 98, 13 L. Ed. 909.

The Supreme Court will examine the opinion of the State Court to ascertain whether the federal question presented was raised and decided, and whether the State Court rested its judgment on adequate non-federal grounds. *State of Indiana vs. Brand*, 303 U. S. 95, 82 L. Ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482.

The record in this case and the opinions of the Court of Criminal Appeals on original submission and upon rehearing clearly reflect that that court held that a confidential telephone communication between the defendant and his counsel made over long distance telephone could be offered in evidence by the testimony of the long distance telephone operator who made the connection and who listened in on the conversation, and that the monitoring of said conversation and the offering of such testimony in evidence did not deny defendant effective aid of counsel under the Constitution of the United States and the Fourteenth Amendment; and that the Court of Criminal Appeals further held in denying defendant's Second Motion for Rehearing that the fact that the attorney, Martin, was an accessory under the Texas Statute and had conflicting interests with the defendant did not deny the defendant effective aid of counsel guaranteed by the Constitution of the United States and the Fourteenth Amendment.

3. Counsel for respondent in their Brief In Opposition seem to make some point, though it is not emphasized, that the petition in this case was not filed within ninety (90) days after the final judgment in the Court of Criminal Appeals. Respondents cite *Webb vs. State*, 110 Crim. Rep. 503, 7 S. W. (2) 562, 9 S. W. (2) 335. In that case the Court of Criminal Appeals had adjourned, and its term had ended, and Motion for Leave to File Second Motion for Rehearing was filed with the Court after the close of the term. The Court of Criminal Appeals refused leave to file the Second Motion for Rehearing.

In our case, the Court of Criminal Appeals wrote an opinion on Motion for Rehearing, in which opinion the Court for the first time held that the attorney for the defendant was an accessory under the Texas Statute, and for the first time the Court of Criminal Appeals based its opinion on the admissibility of the telephone conversation, not on the ground that the telephone operator was an eavesdropper, but on the ground that the attorney in the conversation had given illegal advice, which made him an accessory. In accordance with its practice, where the Court of Criminal Appeals writes an opinion on the Motion for Rehearing, the mandate of the court did not issue for fifteen (15) days, and within said fifteen (15) days, the Motion for Rehearing having been overruled on April 8, 1953, and the Second Motion for Rehearing having been filed on April 22, 1953, the defendant filed his Second Motion for Rehearing. Defendant did not file and was not required to file under the practice of the Court of Criminal Appeals, a Motion for Leave to File said Second Motion for Rehearing.

If the Court of Criminal Appeals under its practice had required a Second Motion for Rehearing to be accompanied by a Motion for Leave to File, the Court would not have considered the defendant's Second Motion for Rehearing in this case. But the Clerk filed the Motion without a Motion for Leave, and the Court considered the Motion without a Motion for Leave and overruled it on May 6, 1953. (Record, pp. 134-136.)

II

The petitioner in his brief upon the Petition for Certiorari stated to the Court that the exact point involved in petitioner's case was not involved in the case of *Coplon vs. United States*, 191 Fed. 2d 749. There the communications over the telephone between the defendant and her counsel were monitored by the Government Enforcement Officers, and the Court held that this denied the defendant effective aid of counsel regardless of whether or not the testimony was offered upon the trial of the case, and regardless of whether or not anything damaging to the defendant was overheard in the monitoring of said conversation.

It is petitioner's contention in this case that the principle of the *Coplon* case applies here, that is, that the defendant in a criminal case is entitled to confidential communications with his attorney, and that these communications may be by telephone if necessary. And if the long distance telephone operator, who is selected as the agent of the defendant by the defendant for the purpose of effecting the long distance communication with his counsel, is permitted to testify as to what occurs and as to what was said in that conversation, then the defendant is denied effective aid of counsel, because such communication has been disclosed and testified to by the agent of the defendant selected to effect such communication.

If the defendant is entitled to communicate with his attorney immediately after an offense has been committed, and if he is entitled to conduct this com-

munication by telephone, then effective aid of counsel is denied him if the telephone operator, who is the agent selected for making said telephone conversation is permitted to testify as to what occurred and what was said during said conversation. It is not the contention of the petitioner in this case that the mere fact that the telephone operator listened to the conversation deprived the defendant of adequate aid of counsel. The thing that deprived the defendant of effective aid of counsel was the admission, upon the trial, of the testimony as to what the operator heard the defendant say to his counsel, and what she heard the counsel say to the defendant. Two recent cases have been decided and reported since petitioner filed his petition and brief in this Court, in which is reiterated what has been universally held by all of the decisions of the higher federal courts, that the right to effective and adequate aid of counsel is an essential requirement for due process of law. These cases are *Sanders vs. United States*, 205 F. 2d 399, from the 5th Circuit, and *Butzman vs. United States*, 205 F. 2d 343, from the 6th Circuit.

These two cases are particularly in point with reference to the disqualification of defendant's attorney, Mr. Martin, who was held by the Court of Criminal Appeals to be an accessory.

In the case of *Sanders vs. United States*, supra, the Court after holding that the right to effective aid of counsel is an essential part of due process of law, held that, when it was contended that a person, who claimed to be insane and was under a prior adjudication of insanity, had waived his right to counsel, the responsibility was upon the Court to

determine whether or not the defendant had intelligently and freely waived his right to counsel. In the *Sanders* case the Court, quoting from *Von Moltke vs. Gillies*, 332 U.S. 708, 722-723, 92 L. Ed. 309, 68 S. Ct. 316, said:

"It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings.

"We have said: 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.' To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."

In *Butzman vs. United States*, supra, the Court says:

"The attorney who represented appellant Butzman was the regularly employed attorney of the Ohio Tool Company. He also undertook to represent the appellant Craig. Craig contends that although no conflict of interest might have shown itself when this dual representation was undertaken, a review of the record as a whole shows that such a conflict developed. Reference is made to the fact that it was to the interest of Butzman to shift responsibility for the alleged false document to one or more of his employees, and that it may have been to Butzman's interest, when faced with unfavorable newspaper publicity, to have waived a jury trial, but there was no such reason for waiving such a trial on the part of Craig. Such a conflict of interest deprives an accused of the effective 'assistance of counsel' as defined by Supreme Court decisions. Glasser v. United States, 315 U. S. 60, 70, 62 S. Ct. 457, 86 L. Ed. 680; United States v. Hayman, 342 U. S. 205, 208, 72 S. Ct. 236, 96 L. Ed. 232. See also Powell v. State of Alabama, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158. This right is too fundamental to permit a Court to indulge in nice calculations as to the amount of prejudice arising from its denial. Glasser v. United States, Supra, 315 U. S. at page 76, 62 S. Ct. 457 86 L. Ed. 680."

The Court of Appeals further said:

"It is well settled that the right to the assistance of counsel can be waived. Johnson v. Zerbst, 304 U. S. 458, 469, 58 S. Ct. 1019, 82 L. Ed. 1461; United States v. Hayman, supra, 342 U. S. at pp. 208-209, 72 S. Ct. 236, 96 L. Ed. 232. However, every reasonable presumption will be indulged against the

waiver to such a fundamental right, Glasser v. United States, supra, 315 U. S., at page 70, 62 S. Ct. 457, 86 L. Ed. 680, and the Court should 'not presume acquiescence in the loss of fundamental rights.' Johnson v. Zerbst, supra, 304 U. S. at page 464, 58 S. Ct. at page 1023, 82 L. Ed. 1461. The Supreme Court also said in Johnson v. Zerbst, supra, 304 U. S. at page 464, 465, 58 S. Ct. at page 1023, that an intelligent waiver of the right of counsel depends upon the particular facts and circumstances in each case, and, 'whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for the determination to appear upon the record'."

In further discussing the matter the Court of Appeals said:

"Representation by a particular attorney may be under such circumstances as not to meet the constitutional requirement. Glasser v. United States, supra; United States v. Hayman, supra. The issue was not raised in the trial court, and the present record does not show under what circumstances Craig consented to the dual representation. Apparently Craig's present contention is that he did not intelligently and voluntarily waive his right of representation by separate counsel of his own choosing. The Government's contention that such contentions cannot be substantiated does not deny appellant the opportunity of supporting them by evidence. Walker v. Johnston, 312 U. S. 275, 287, 61 S. Ct. 574, 85 L. Ed. 830. The issue is one which should be properly be presented to the trial court instead of being raised for the first time in this Court on an incomplete record. Sec. 2255, Title 28 U. S. Code, provides for such a hearing. United States v. Hayman, supra. The ruling on the appeal of Craig will be suspended

for a reasonable period of time, during which the appellant may present this issue to the trial court, if he so desires, following which the matter may be again brought to us for a final ruling."

The Court of Appeals then remanded the case of Craig to the District Court for further proceedings consistent with the views expressed above.

There is no comparable practice in the state courts of Texas for the higher court to suspend its decision and remand the case to the District Court for the determination of whether or not the defendant, Clark, was denied effective aid of counsel because of the disqualification and conflicting interest of his attorney. But under the record of this case where it appears that the interest of the attorney was conflicting and adverse to his client, the defendant, and that the defendant's principal defense was insanity, or temporary insanity, the reasonable presumption will be indulged against the waiver of such a fundamental right, and this court will hold under the record that the defendant did not have effective and adequate aid of counsel upon his trial.

Respondents cite only one case, in attempting to distinguish the rule of the *Glasser* case. It is *Tompsett v. State of Ohio*, 142 F. 2d 95. This case is not in point, because it appears from the record in that case that the defendant was wholly competent, and was particularly familiar with court procedure, and that he understood all that was done during the trial and that he fully and intelligently waived his right to object to the disqualification of his attorney.

There is dicta in this last case with which we wholly disagree. We say that the Court did not in-

tend to hold what respondents say the Court held. The quotation from the decision is as follows:

"The claim of appellant that his attorney was improperly influenced by the prosecuting officials of Ohio becomes immaterial to the issue because of the rule here applied that appellant acquiesced in the attorney's conduct. Under such circumstances the motive of the attorney is immaterial as it did not influence appellant in his acquiescence."

Attorneys for this petitioner say that if the above quotation means that the prosecuting officials of a sovereign prosecuting a criminal case may corrupt the attorney for a defendant and influence such attorney against the interest of his client, and such facts are unknown to the defendant, and that the defendant may not avail himself of such wrongful act and such corruption, because he acquiesces in the act of his attorney upon the trial, then we say that such decision is wrong and is not the law.

A defendant who is a layman and who is not skilled in the law or in procedure cannot intelligently acquiesce in the acts of his attorney taken during the trial of such a technical procedure as a criminal case, and as said in *Johnson v. Zerbst*, *supra*, "acquiescence will not be presumed".

A layman who is represented by an attorney in a criminal case, in accepting the course of the trial and what occurs during the trial does so on the advice of his attorney, because the attorney is learned in the law, and because the client has a right to rely upon such attorney's honest and impartial counsel and advice. Such acquiescence as a layman may

make in his trial is acquiescence based upon the advice of the counsel of his choice, relying upon the fact that it is his own attorney uninfluenced by any other person, and particularly uninfluenced by the Government or State in opposition. We do not believe that the law is that, if the State or Government has corrupted the defendant's counsel, this is wholly immaterial, because counsel has acquiesced in the acts of the attorney during the trial. This might be true if the defendant was an attorney himself. It is certainly not true of a man who is engaged in the hotel business and whose very defense was that he did not understand the nature and consequences of his act.

The decision in the *Tompsett* case may be supported and justified by the fact that the particular defendant in that case was found by the Court to be well versed in legal matters, and because the acts of which the attorney in that case was guilty were not acts of a lawyer, and did not have to do with legal matters, but constituted inefficiency that even a layman could recognize. But no decision can be justified which holds that a defendant, without knowledge of the dishonesty of his attorney, and without knowledge of the fact that the attorney is being influenced by the opposition, acquiesces in the legal steps taken by his attorney in his behalf. This supreme Court has never held to any such doctrine, and we have confidence that it never will. We know of no other decision other than the *Tompsett* case that even hints at such a rule.

III

Conclusion

Petitioner submits that the decisions of the Supreme Court have clearly established that the right to effective and adequate aid of counsel is part of due process of law, and that if such effective aid is denied a defendant he is denied due process of law. The decisions of this Court have further established that a defendant is entitled to confidential communication with his counsel at all stages of a criminal proceeding, and that this communication may be by telephone. The decisions of this Court have further established that if this right of confidential communication is denied the defendant, and if his right to talk over the telephone to his lawyer is effectively denied him, then he is denied due process of law in his trial.

The decisions of this Supreme Court have further clearly established that conflicting interest of a particular attorney with the interest of the defendant in a criminal case denies the defendant effective and adequate aid of counsel, unless such right to counsel is intelligently and clearly waived by the defendant. And the decisions of this Court have established that the wiaver will not be presumed, but that it is the duty of the trial court judge to ascertain whether such waiver has been intelligently made, and that such finding of the judge of waiver of effective aid of counsel should appear as a matter found by the Court in record of the proceedings.

Petitioner submits that under the federal questions presented, this case should be reversed and remanded for a trial in the trial court in which the defendant's constitutional rights will be effectively preserved.

Copies of this reply brief have been furnished to counsel for the respondent.

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OCT 26 1953
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK,

Petitioner,

vs.

THE STATE OF TEXAS

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK,

Petitioner,

vs.

THE STATE OF TEXAS

PETITION FOR REHEARING ON PETITION FOR CERTIORARI

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Under the provisions of Supreme Court Rule 33, now within the time provided by said rule, your petitioner respectfully files this his petition for rehearing, asking this Court to reconsider its action in refusing petitioner's Petition for Certiorari heretofore filed in this Court, and in particular petitioner desires to cite and discuss with the Court authorities not heretofore cited to the Court, and as hereinafter set out, one authority which has been reported after the petition and arguments in this cause were filed. The

grounds relied upon for this Petition for Rehearing are as follows:

1. The action of this Court in refusing the Petition for Certiorari will result in sustaining a conviction of the petitioner and a death penalty secured by the use on the part of The State of Texas of the confidential conversation between the petitioner and his attorney after the commission of the offense and at a time when it appears that the petitioner was seeking advice and aid of counsel in connection with the offense and acts charged in the indictment.

The petitioner had a right at the time he talked to his attorney and to confer with his attorney over the long distance telephone. It was impossible for the petitioner to engage in said telephone conversation except through the agency of the long distance telephone operator who accepted and placed the call. The long distance telephone operator was the agent of the defendant in effecting the confidential communication with his attorney. If it is permitted that the operator may testify with reference to said conversation, then the defendant has been denied the right to carry on said conversation and said communication with his attorney, and he has been denied the effective aid of his attorney at the very beginning of the case. If it be conceded that the defendant in a criminal case after the offense has been committed is entitled to contact an attorney and to talk to said attorney on the telephone, then it must be conceded that such defendant would not dare to engage in such a conversation if the operator who completes his call is to be permitted to testify to what she overheard during such conversation between him and his attorney.

In the recent case of *Caldwell* v. *The United States*, 205 Fed. (2d) 879, by the Court of Appeals for the District of Columbia Circuit, the Court reannounced the doctrine of

Coplen v. *United States,* 191 Fed. (2d) 749. In this last case the Court of Appeals said:

"We have in the record the written reports of Bradley to the prosecutor, reviewed and corrected by the latter. We may have understated the facts. But we are certain we have not overstated them.

"On these facts, so stated, we think our decision in the *Coplen* v. *U. S.* case is controlling. We there held flatly that 'the prosecution is not entitled to have a representative present to hear the conversations of accused and counsel.' More specially, we held that interception of supposedly private telephone consultation between accused and counsel, before and during trial, denies the accused his constitutional right to effective assistance of counsel, under the 5th and 6th Amendments. And the denial 'invalidates the trial at which it occurs and requires a verdict of guilty therein to be set aside regardless of whether prejudice was shown to have resulted from the denial'. We see no reason why intrusion by means of wire tapping should be differentiated from intrusion by means of secret agents. In neither instance, we think, need actual prejudice be shown in order to entitle defendant to a new trial.

"We do not mean to deny the right indeed the duty—of prosecuting officials to seek to uncover, prosecute, and punish resort by accused persons and their counsel to theft of files or other unlawful means of defense. We recognize that the prosecutor in this case was faced with a real dilemma, once the possibility of a theft of the files had been reported by Bradley. We do not question that he then acted with what must have been high motives, and certainly with active diligence. ***But high motives and zeal for law enforcement cannot justify spying upon and intrusion into the relationship between a person accused of crime and his counsel.*** The Constitution's prohibitions against

unreasonable searches, and its guarantees of due process of law and effective representation by counsel, lose most of its substance if the Government can with impunity place a secret agent in a lawyer's office to inspect the confidential papers of the defendant and his advisors, to listen to their conversations and participate in their counsels of defense. Conduct of that sort on the part of our Government is no doubt extremely rare. But if it does occur a conviction tainted by it cannot stand. Appellant's Motion for New Trial should have been granted." (Italics ours.)

In the above case the witness Bradley posed as a lawyer. Under the employment of the Government, Bradley became intimately acquainted with appellant and appellant's counsel. Soon Bradley was solicited to work for the defendant, on a number of matters arising in the preparation of the case. Bradley reported this to the prosecution and was told not to undertake employment with the defense or accept money from them, but to continue his work in attempting to discover what the defendant and his lawyer were doing. In his dual capacity as defense assistant and Government agent, Bradley so conducted himself that he gained access to the secrets of the defense. Bradley testified that in one of the conferences that he, the defendant and his counsel planned to steal the Government files.

The facts in the case were very similar on the question of law as to the facts in our case. The Court of Criminal Appeals of Texas held that because the lawyer and his client were engaged in an unlawful and illegal conversation, and because the lawyer advised the client to dispose of the murder weapon, that this illegal action destroyed the privilege, and denied the defendant benefit of his confidential communications with his counsel.

But in the *Caldwell* case the Court of Appeals for the District of Columbia Circuit held the fact that the activities

with reference to which Bradley reported to the prosecution were illegal did not affect the question of due process of law.

The District Attorney in our case was not entitled to have the benefit of the long distance telephone operator in spying upon and intrusion into the relationship between the petitioner accused of crime and his counsel. The prosecution is not entitled to the benefit of a secret agent of the defendant who is present and listening in upon and spying upon his confidential communication with his attorney. To permit the use of such testimony evades and destroys the defendant's right to effective aid of counsel, and as suggested in the *Caldwell* case probably to his right against unreasonable search. What occurred in our case goes far beyond the facts of the case of *Lee* v. *The United States*, 343 U. S. 747, 96 L. Ed. 1270, 72 S. Ct. 967, because it was not confined to spying on the defendant alone nor to merely getting evidence, but the intrusion involved was upon the conference, supposedly open only to the accused and his counsel.

Petitioner submits that this Court should hold in line with the *Caldwell* case and the *Coplen* case.

2. The Supreme Court should grant the Petition for Rehearing in this case because since the decision of the Court of Criminal Appeals of the State of Texas in this cause, and while this cause was pending in this Court on Petition for Certiorari and before the judgment in this case has become final, the rule of law as announced by this Court in *Schwartz* v. *State*, 246 S. W. (2) 174, certiorari denied, 343 U. S. 975, 72 S. Ct. 1073, 96 L. Ed. 1368, affirmed, 97 L. Ed. 157, has been changed by statute in the State of Texas, and the testimony admitted in this case as to the interception of the telephone conversation between the petitioner and his attorney is no longer admissible in

evidence under the laws of the State of Texas, because such evidence was received in violation of the Federal Communications Act, U.S.C.A., Title 47, Section 605.

The admissibility of the interception of the telephone communication between the petitioner and his attorney under the laws that exist at the present time raises a new federal question which has not been passed upon by the Court of Criminal Appeals of the State of Texas and by this Court, the Supreme Court, in its action in refusing the Petition for Certiorari.

As a result of the decision of the Court of Criminal Appeals of the State of Texas and the Supreme Court of the United States in the *Schwartz* case, and as a result of the decision of the Court of Criminal Appeals in this *Clark* case, the 53rd Legislature of the State of Texas, at its regular session, Laws of 1953, effective June 4, 1953, being Senate Bill No. 127, Chapter 253, of said acts, amended Article 727a, of the Code of Criminal Procedure of the State of Texas, so as to change the rule of the *Schwartz* case.

The new act, Chapter 253, of the Acts of 1953, effective June 4, 1953, amends Article 727a, of the Code of Criminal Procedure of the State of Texas to read as follows:

"Article 727a. No evidence obtained by officer or other person in violation of any provision of the constitution *or laws of the United States* or this State shall be admitted in evidence against the accused on the trial of any criminal case." (Italics ours.)

Under this amended statute evidence obtained in violation of U.S.C.A., Title 47, Section 605, is no longer admissible in evidence in the trial of a criminal case in the State of Texas. Petitioner conceives the law to be that since the laws of the State of Texas were amended in

regard to this fundamental rule of evidence before the judgment of conviction in this case became final, that the petitioner is entitled to the benefit of the new statute, and that the conviction secured on the operation of the evidential rules under the old statute is erroneous and should not be permitted to stand.

The amended statute in Texas, Chapter 253, of the Acts of 1953, was passed as an emergency act, and as an emergency measure passed by a two-thirds vote, under the Constitution of the State of Texas, became immediately effective after its approval on June 4, 1953. The statute was passed and the old statute was amended without any saving clause with reference to cases pending, or with reference to pending prosecutions.

The rule is well established that "if a penal statute is repealed pending an appeal or writ of error, and before the final action of the appellate court, it will prevent an affirmance of a conviction, and the prosecution must be dismissed or the judgment reversed. See 50 Am. Jurisprudence, Sec. 570, Page 571; *United States* v. *The Peggy*, 1 Cranch (U.S.) 103, 2 L. Ed. 49; *Wall* v. *State*, 18 Tex. 682, 70 Am. Dec. 302; *Sheppard* v. *State*, 1 Tex. App. 522, 28 Am. Rep. 422.

The Supreme Court of the United States held in *Massey* v. *United States*, 291 U. S. 608, 54 S. Ct. 532, 78 L. Ed. 1019, where a judgment of conviction for conspiracy to violate the National Prohibition Act had not become final by reason of a stay by the Federal Circuit Court of Appeals of its mandate pending a petition to the Supreme Court of the United States for a writ of Certiorari to review its affirmance of such judgment, and where the 18th Amendment had been repealed while said case was pending on such petition for writ of certiorari, that the defendant was entitled to a vacation of the judgment and a dismissal of the indictment.

The Supreme Court of the United States held in *Weiss* v. *United States,* 308 U. S. 321, 60 S. Ct. 269, 84 L. Ed. 298, that intrastate, as well as interstate, telephone messages are within the interdiction, by Section 605 of the Federal Communications Act of 1934, of the interception and divulsion of a telegraph or telephonic communication by any person not authorized by the sender.

In *United States* v. *Polakoff,* 112 Fed. (2d) 888, 134 A. L. R. 607, certiorari denied 311 U. S. 653, 61 S. Ct. 41, 85 L. Ed. 418, it was held that under Section 605, a message is intercepted within the prohibition of the communications act when anyone intercepts a message to whose intervention as a listener the communicants do not consent, irrespective of the means employed to accomplish the interception. In that case a recording machine was fixed to an existing extension of the familiar kind in an adjoining room. Judge Hand said:

"We assume that the situation would have been no different, had the agent merely listened at the extension, and taken down what he heard by shorthand. The statute does not speak of physical interruptions of the circuit, or of 'taps'; it speaks of 'interceptions' and anyone intercepts a message to whose intervention as a listener the communicants do not consent; the means he employs can have no importance; it is the breach of privacy that counts."

Counsel recognize that the rule is not always the same with reference to the rule of law involved herein in the case of a change or repeal of the substantive law defining the crime or changing the penalty and an amendment of the statute changing the evidentiary rules. However, a case of this kind where the chief evidence against the defendant was admitted in violation of a federal statute, and, under the rule existing at the time the case was tried, such evi-

dence was admissible under the state law, petitioner conceives that, where so fundamental a change as to amend the statute as to render the testimony inadmissible if the case were tried again, and to render the evidence inadmissible at the very time the appeal is being decided by the appellate courts, the rule should be the same with reference to such a change as would prevail if the substantive offense itself had been repealed or materially altered.

If the State Legislature had desired to protect those cases pending at the time the legislation was passed or to protect cases that were pending on appeal at the time the legislation was passed, it would have been very easy for the Legislature to have provided in the amendatory act a saving clause which would have provided that the new statute should not be construed as to apply to any pending prosecutions. Clearly it seems that this case should be reversed in order that the case might be tried under the rules of evidence as exist at the present time while this case is pending on appeal and before the judgment has become final. The right claimed in this Petition for Rehearing exists by virtue of the Federal Communications Act, and by virtue of the present Texas Statute which makes inadmissible any evidence secured in violation of said federal statute.

3. Wherefore petitioner prays this his Petition for Rehearing be granted, and that his Petition for Writ of Certiorari to the Court of Criminal Appeals of the State of Texas be granted, and that upon a final hearing the judgments of the Court of Criminal Appeals of Texas and the District Court of Tom Green County, Texas, be reversed and that this cause be remanded for a new trial.

4. Undersigned counsel for petitioner and attorney of this Court hereby certified that this Petition for Rehearing is presented in good faith and not for delay and that the

petition is restricted to intervening circumstances of substantial and controlling effect; and to other substantial grounds available to petitioner though not previously presented.

Copies of this petition have been served upon the Attorney General of Texas and Counsel for respondent.

Respectfully submitted,

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 232

CHARLES D. CLARK,
Petitioner,

vs.

THE STATE OF TEXAS

RESPONDENT'S REPLY TO PETITION FOR REHEARING FOR CERTIORARI

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now the State of Texas, Respondent, and would show to this Honorable Court that Petitioner, Charles D. Clark, has set forth nothing new or worthy of consideration in his petition for rehearing.

Petitioner cites the case of *Caldwell vs. United States*, 205 Fed. 2nd 879, by the Court of Appeals of the District of Columbia Circuit, which case has no application to the case at bar. In the *Caldwell case*,

the Honorable Court of Appeals needed little space to strike down and criticize the action of the prosecution in intruding by means of a secret agent into the relationship between accused and his counsel. As in *Coplen vs. United States*, 191 Fed. 2nd 749, the Court of Appeals for the District of Columbia set aside a conviction because of the scheme, the plan of the prosecution, resulting in such intrusion, the intrusion in each case occurring after the arrest and indictment of the respective parties.

In the *Caldwell Case*, between the time when Bennie Caldwell was indicted and his trial, the prosecution placed one Bradley within the office of Caldwell's counsel. Bradley, posing as a friend and attorney, was able to secure the confidence of accused and his attorney, to participate in their conferences and to inspect their confidential papers. All the information obtained by Bradley was disclosed to the prosecution and Caldwell was tried with all of the disclosures being known by, and available to, the government.

We have nothing remotely comparable to *Caldwell vs. United States* in this case. We have no plan, no scheme, no spying, no informer instigated by an overzealous prosecutor. We have only an eavesdropper overhearing a conversation by the Petitioner and his attorney. This Honorable Court will realize, as did the Court of last resort in Texas, that this case is not analogous to the *Coplen Case*, nor is it analagous to *Caldwell vs. United States*.

As the basis of his second proposition in the petition for rehearing, Petitioner has made bold and mis-

leading statements, whether designedly or not, upon which he asks this Court for a reversal of his just and rightful conviction. Without support, other than his own statements, he would attempt to inform this Honorable Court of the reason behind legislation. He would tell this Court that such legislation should have retrospective effect, although the Legislature of Texas has remained silent on this in deference to the prohibition against retroactive legislation in the Texas Constitution. He would lead the Court to believe that a new Federal question can be raised by a legislative change in the rules of evidence and that he is entitled to be tried again with the benefit of such change.

Petitioner quotes Article 727a of the Code of Criminal Procedure of Texas, as amended, in support of his second proposition. He follows this with the citation of cases dealing with the effect of the *repeal* of a penal statute *pending* an appeal. The cases cited concerning the *repeal* of statutes defining offenses have no application here. Article 727a of the Code of Criminal Procedure of Texas was *amended* in June of 1953, not *repealed*. This article is an amendment of a rule of procedure, not a *repeal* of any statute. Cold-blooded murder is still a crime in Texas, just as it was when the amended Article 727a became effective.

Of greater importance, at the time when the amended Article 727a became effective, on June 4, 1953, this case had been *finally* disposed of by the Texas Court of Criminal Appeals. Petitioner's second

motion for rehearing was overruled by the Texas Court on May 6, 1953. On that date, long before the amended article became effective, this case was over. On May 6, 1953, this case had gone through every process, procedure, judgment and hearing made and provided by the laws of the State of Texas. Therefore, on June 4, 1953, there was nothing pending in this case.

Petitioner asks for the benefit of the amended article and, unsupported, "conceives the law to be" that he is entitled to such benefit. Petitioner's conception of the law is in error, for he is only entitled to be tried under the law in effect at the time of the commission of this horrible crime. As is emphatically stated in Article 13 of the Penal Code of Texas:

"In *every* case, the accused shall be tried under the law in force when the offense was committed, and if convicted punished under that law." (Emphasis ours.)

The clearest indication of the holding of the Court of Criminal Appeals of Texas on the effect of a change in procedural rules is found in two cases which were handed down on the same day by that Court, these being *Butler vs. State*, 51 S.W. (2) 384 and *McBride vs. State*, 51 S.W. (2) 385. Appealing from different district courts, both defendants had been convicted of murder. In each case the defendant complained on appeal of the failure of the trial court to charge the jury in compliance with Texas Penal Code, Article 1257c. Like Article 727a, as

amended, Article 1257c is a statute dealing with procedure in criminal cases, not substantive law. In the *Butler Case*, the Court of Criminal Appeals *reversed* the conviction, saying that *at the time of trial, Article 1257c was effective* and the Court erred in failing to submit a charge consistent with its provisions.

Defendant McBride, in a motion for rehearing, also complained of the failure of the Court to charge the jury in the light of Article 1257c. In *affirming* McBride's conviction, the Court of Criminal Appeals of Texas, said:

"This case was tried in March, 1931, *prior* to the taking effect of chapter 60, Acts Regular Session, 42nd Legislature (Vernon's Ann. P.C. art. 1257c), and must be passed on in the light of the law as it then was (Vernon's Ann. P. C. arts. 1256-1257b).

"* * * At the time of this trial the law went no further than to require that the jury determine from all relevant and pertinent facts in issue (1) whether the homicide was murder, and (2) whether it was upon malice aforethought. We have a different state of facts in certain cases under the law as it was changed by the act referred to. See Butler v. State (Tex.Cr.App.) 51 S.W. 2nd 384, opinion this day handed down. We perceive no error in the matters complained of."

Thus, it is seen that an accused must be tried in the light of the law existing at the time of the commission of the crime and in accordance with the rules of procedure and evidence in effect at the time of

trial. Petitioner Clark is entitled to no more than this and such has been fully accorded him.

WHEREFORE, it is respectfully submitted that the Petition for rehearing should be overruled and denied.

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